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Supreme Court, U. S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

NATIONAL ASSOCIATION OF MINORITY CONTRACTORS and MINORITY CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, INC.,
Petitioners,

VS.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. In light of decisions such as *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971), may a state enact a statute which effectively prohibits all race-conscious remedies for prior discrimination, even where such remedies are premised upon findings of constitutional or statutory violations?

2. Where a state agency finds the existence of prior discrimination against racial minorities in areas of its legal responsibility, is that agency under a duty to take appropriate action, including the adoption of race-conscious programs, to remedy the discrimination which it has identified?

3. May a governmental entity other than Congress adopt a minority set-aside program to remedy past discrimination against minority-owned businesses?[1a]

[1a] In the proceedings before the Ninth Circuit, the San Francisco Unified School District, the San Francisco Board of Education, the National Association of Minority Contractors and the Minority Contractors Association of Northern California were the appellants. The Associated General Contractors of California and individual contractors and subcontractors engaged in the building and construction industry in San Francisco were appellees.

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Petitioners National Association of Minority Contractors and Minority Contractors Association of Northern California, Inc. respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 11, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*) is reported at 616 F.2d 1381. That Court's order denying petitioners' Petition for Rehearing with Suggestion of

Rehearing En Banc (App. B, *infra*) was filed on April 25, 1980, and is not reported. The opinion of the District Court granting a preliminary injunction was filed on March 17, 1977, (App. F, G, *infra*) and is unreported. Its opinion refusing to dissolve the preliminary injunction (App. E, *infra*) is reported at 431 F.Supp. 854. The District Court's order granting a permanent injunction under the caption "Orders on Motions, Findings of Fact, Conclusions of Law and Judgment of Permanent Injunction" was filed on July 20, 1977, (App. C, D, *infra*) and is not reported.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed on February 11, 1980. A timely petition for rehearing with suggestion of rehearing *en banc* was denied on April 25, 1980. Thereafter, on July 1, 1980, Justice William H. Rehnquist signed an order extending the time for filing this petition for certiorari to and including August 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional provisions and statutes are: U.S. Const. Amend. XIV; 42 U.S.C. §§ 1981 & 1983; Calif. Educ. Code §§ 35160 & 39640, all of which are reproduced in Appendix H.

STATEMENT OF THE CASE

This case involves the legality of the Affirmative Action Policy adopted by the San Francisco Unified School District ("District"), which mandates that general contractors on school construction projects over $100,000 "employ nonwhite owned businesses for individual contract dollar amounts which total at least 25% of the general contract dollar bid." The policy was implemented to remedy past discrimination in District construction

projects, which its governing Board expressly found, and to assure that this discrimination was "not perpetuated by the [District's] construction program." (App. E, Exh. A, p. 6). The District Court enjoined the Board's policy as contrary to California's "low bid" law and the Court of Appeals affirmed after specifically rejecting the argument that the "low bid" law, as interpreted, contravened both the California and United States Constitutions.

The Parties

Petitioners, the National Association of Minority Contractors and Minority Contractors Association of Northern California, Inc., are two associations of minority contractors doing business in the San Francisco area. Because the District's Affirmative Action Policy directly impacted on the ability of the members of these associations to obtain jobs in the public construction industry, both associations sought to intervene in the District Court action challenging the legality of that program. Permission to intervene was granted on November 1, 1976, and both associations thereafter participated fully in the proceedings in the District Court and the Court of Appeals.

The District, a defendant below, is a duly organized political subdivision of the State of California consisting of the public schools in San Francisco. The San Francisco Board of Education ("Board"), also a defendant below, is the responsible governing body of the District, and is endowed by state law with broad authority to initiate all programs or activities necessary for the successful and on-going operations of the District, including the construction and repair of school buildings and facilities. Calif. Educ. Code §§ 35160, 35270, 39170, 39172 and 39173. The Affirmative Action Policy invalidated by the courts below was implemented by the Board under this grant of authority.

Respondents, plaintiffs below, are several unincorporated associations of general contractors and subcontractors engaged in the construction industry in San Francisco, as well as a number of individual contractors and subcontractors who work in the building and construction industry. None of the plaintiffs is a "nonwhite owned business" as that term is defined in the Board's Affirmative Action Policy.

The Affirmative Action Policy

In March 1977, the Board adopted an Affirmative Action Policy to overcome the effects of past discrimination in the awarding of District construction contracts. The policy was predicated, *inter alia*, on the following findings made by the Board:

(1) That hearings conducted by the Department of Labor in San Francisco in 1970 revealed that "minority workers have been prevented from fully participating in the construction trades and that utilization of minority subcontractors by contractors could significantly expand the participation of minority craftsmen on projects of federal construction contractors." After these hearings, the San Francisco Plan was implemented by the Department of Labor setting minimum goals for participation of minorities on federal contracts.

(2) That during the period January 1964 through June 1975, minority contractors and subcontractors participated in the performance of only 4.99% of the $87,241,573 worth of school construction projects let in San Francisco.

(3) That in the period July 1, 1975 through October 30, 1976—during which time the Board had a policy of requiring a minimum of 25% minority participation in School District contracts—minority contractors parti-

cipated in 33.4% of the total dollar amount of construction contracts let.

(4) That there exist in the City and County of San Francisco competent and qualified minority contractors and subcontractors able and willing to perform school construction contracts, and "that the failure of minority contractors and subcontractors to participate more fully in the performance of school construction contracts has resulted primarily from exclusion from participation therein and discrimination based upon race, religion, color, sex or national origin contrary to federal, state and local laws." (App. E, Exh. A, pp. 3-5).

Seeking to assure that the past discrimination which it had found was "not perpetuated by the District's construction program," the Board formulated an Affirmative Action Policy which mandated that general contractors on school construction projects over $100,000 "employ nonwhite owned businesses for individual contract dollar amounts which total at least 25% of the general contract dollar bid." A general contractor who submitted a bid not meeting the 25% dollar participation goal was, under the Board's policy, deemed not to be a "responsible" bidder under California's "low bid" law. Calif. Educ. Code § 39640. However, in such circumstances, the low monetary bidder on a project was entitled to a hearing before the Board, and the Board was authorized to award a contract notwithstanding non-compliance if it determined that the contractor had "taken every possible measure to comply [with the policy], or that it is not practicable in the best interests of the District to require compliance in the specific case." For purposes of the Affirmative Action Policy, "nonwhite" was defined to include those "whose racial ancestry is one, or a mix, of the following: Black, Asian, Latin American, American Indian or any native Pacific

Island group. A person whose ancestry is a mixture of white and nonwhite will be considered 'nonwhite' if such ancestry is one-quarter or more nonwhite." (App. E, Exh. A, pp. 5-10).

Prior Proceedings

Prior to the adoption of the Affirmative Action Policy at issue here, the Board had since July 1, 1975, operated a related program which also required a contractor who wished to be considered "a responsible bidder" to grant at least 25% of the dollar value of subcontract work to "minority owned" businesses. On October 8, 1976, this original program was challenged in a suit brought in district court by various non-minority general and subcontractors—respondents herein.[1] The complaint alleged that the program contravened the Fourteenth Amendment, Title VII (42 U.S.C. § 2000e *et seq.*), and 42 U.S.C. §§ 1981 & 1983, as well as California's "low bid" law, Educ. Code § 39640, which requires that contracts be awarded to the "lowest responsible bidder". The suit sought an injunction, declaratory relief and damages.

On March 17, 1977, the district court issued a preliminary injunction preventing the District and Board from continuing to follow the affirmative action policy then in force. This injunction was based not on any of the grounds urged by plaintiffs, but on the sole ground that the evidence had failed to establish that the policy was the "will of the Board established by Board action appropriate to carry out that will." (App. F, p. 8) Shortly after issuance of this injunction, the Board formally adopted the Affirmative Action Policy previously described.

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[1]Jurisdiction over the federal statutory and constitutional claims was invoked pursuant to 28 U.S.C. §§ 1343(3) & (4). Since the federal claims were substantial ones, the court also asserted pendent jurisdiction over the state law issues.

On May 17, 1977, the district court issued an order preliminarily enjoining the Board's new policy. For the court the critical question was not whether the Board's purpose in enacting the program was a proper one, but instead whether the Board "ha[d] the legal authority" to do so. Turning to what it perceived as the only conceivable source of such authority, the "low bid" law, the court held that the requisite legislative authorization for the policy was absent. (App. E).

Intervenors thereafter moved for reconsideration on the ground that the requisite authority for the policy was to be found not in the "low bid" law, but in those state statutes defining the powers of the District. The only relevance of the "low bid" law was plaintiffs' contention that it somehow *limited* the powers of the Board to enact and implement the challenged minority participation program. More, intervenors argued that if the "low bid" law were construed as a limit on the Board's power to eliminate the effects of past discrimination, the statute was to that extent unconstitutional. (C.T. 1593-95). On July 20, 1977, the court reaffirmed its prior opinion holding that the "low bid" law did limit whatever other powers the Board had to undertake affirmative action. (App. C). Intervenors' constitutional challenge to the "low bid" law was left unanswered. Summary judgment and a permanent injunction were then entered in favor of plaintiffs.[2] (App. D).

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[2]In July 1977, the Board's application for federal public works funds was approved, and the Board shortly thereafter formulated a new minority dollar participation policy. The new policy also contained a 25% minority dollar participation goal, but this goal only applied to construction projects financed with federal funds. Plaintiffs, arguing that this new program violated the injunction, initiated contempt proceedings against the Board. The District Court declined to hold the Board in contempt, and revised the permanent injunction to allow a *10%* minority dollar participation goal on federally funded projects. That ruling is not in issue here.

On February 11, 1980, the Ninth Circuit affirmed the decision of the district court.[3] After reiterating and endorsing the district court's interpretation of the state "low bid" law as a bar to the Board's Affirmative Action Policy, the court turned at length to the question of whether this interpretation of the "low bid" law rendered it unconstitutional.

The court's analysis of that question was premised upon a perceived distinction between "the two major types of positive governmental action taken on behalf of minorities": "reshuffle" programs and "stacked deck" programs. The former, according to the court, do not involve the granting or withholding of benefits to any individual on the basis of "that person's group status," but simply serve to ensure "that everyone in every group enjoys the same rights in the same place." "Stacked deck" programs, by contrast, are those in which the state "specifically favors members of minorities in the competition with members of the majority for benefits that the state can give to some citizens but not to all." School desegregation programs are the most common type of "reshuffle" programs while affirmative action programs fall into the "stacked deck" category. (App. A, pp. 17-19)

The court then derived from the school desegregation cases the principle that while in certain circumstances the "state has an affirmative constitutional duty to use 'reshuffle programs to cure the effects of past or present *de jure*

[3]In an earlier opinion, the Ninth Circuit addressed only the question of "whether or not the Board had the authority to adopt a 25% minority dollar participation program." Thereafter, the Board and Intervenors petitioned for rehearing on the ground, *inter alia*, that the Ninth Circuit's opinion failed to address the constitutional issues raised by appellants. That is, whether the low bid law, when interpreted as a limit on the Board's authority to undertake an affirmative action program, was a constitutional exercise of state legislative power. On February 11, 1980, the Ninth Circuit withdrew its earlier opinion and substituted a second opinion. It is that latter opinion which forms the basis for this petition.

segregation, "there is no constitutional duty to engage in 'stacked deck' affirmative action." (App. A, pp. 20-21). In the court's view, the reason for the disparate constitutional stature of the two remedies was that " 'stacked deck' programs trench on Fourteenth Amendment values in ways that 'reshuffle' programs do not." (App. A, pp. 21-24). More, the court observed that, "even if the argued-for constitutional duty exists, it could not come into play until proper findings were made of discrimination and the need for affirmative action to redress it." And here the Board could not possibly make such findings since the Legislature, through the "low bid" law, had already reached, *a priori,* the contrary conclusion.[4] (App. A, pp. 28-29, 39 n.14)

From the premise that the Board was not under a constitutional duty to implement its Affirmative Action Policy, it was a short step to the conclusion that the state's "low bid" law was a constitutionally permissible exercise of legislative authority. While prior cases had invalidated state statutes which barred certain types of remedial programs, the Ninth Circuit read those cases to apply "only if the [public] bodies had an affirmative constitutional duty which cannot be effectively fulfilled because of the statute." (App. A, p. 36 n.13) Since the Board was under no constitutional duty regarding its Affirmative Action Policy, the "low bid" law could, constitutionally, undermine the validity of that policy.

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[4]The court did acknowledge that "stacked deck" remedies have been imposed by courts after making findings of past discrimination, but found the basis for such remedies to be the "broad powers of equity" rather than any preexisting constitutional duty. (App. A, pp. 24-26). Nor did the court accept the argument that the Board was under a constitutional duty to continue its policy once it became evident that the District's affirmative action program operated in practice to dispel discrimination. (App. A, pp. 32-34).

REASONS FOR GRANTING THE WRIT

Petitioners submit that this case involves issues raised but not resolved by several recent decisions touching on the legitimacy of race-conscious remedies for past discrimination, and that the resolution of such questions here would be an appropriate exercise of this Court's jurisdiction. In particular, this petition should be granted for the following reasons:

1. In light of this Court's repeated recognition that race-conscious remedies play an important role in the elimination of discrimination and its effects, the Ninth Circuit's determination that a state is free, by statute, to bar affirmative action programs—without regard to their precise nature or the existence of prior findings of past discrimination—seriously threatens the viability of such programs. Such a result is regrettable as a matter of constitutional policy. More, it is dubious as a matter of constitutional law given this Court's prior decisions in cases such as *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971) and *Chropowicki v. Lee*, 402 U.S. 935 (1971).

2. The Affirmative Action Policy adopted by the San Francisco Unified School District in this case was premised upon explicit findings of discrimination in *that District's* school construction projects and the resistance of that discrimination to previously implemented non-compulsory anti-discrimination programs. In view of that record, petitioners suggest that the District was not merely entitled, but *obliged*, to take appropriate, race-conscious remedial action to eliminate the existing pattern of discrimination which it had identified. Indeed, the existence of such an obligation would appear to follow from the principles articulated in cases like *Louisiana v. United States*, 380 U.S. 145, 154 (1965) and *Green v. County School Board*, 391 U.S. 430, 437-38 (1968). Thus, the Ninth Circuit's unequivocal re-

jection of any constitutional duty to undertake affirmative action even as a remedy for past discrimination is not only appropriate for review, standing alone, but is made the more appropriate by the fact that it also conflicts with the position taken by the Sixth Circuit in *Detroit Police Officers Assn. v. Young,* 608 F.2d 671, 691-92 (6th Cir. 1979). A petition for certiorari in *Young* was filed on January 10, 1980, and remains pending. See No. 79-1083.

3. In *Fullilove v. Klutznick,* ..... U.S. ..... (1980), this Court upheld a minority participation plan adopted by the United States Congress to remedy the exclusion of minority-owned businesses from the construction industry. That program is analogous in all material respects to the program in issue here save that the latter was adopted not by the Congress, but by a state agency charged, by law, with the responsibility for constructing and maintaining school facilities. The authority of an entity other than the United States Congress to implement such a program is an important issue not resolved in *Fullilove* and expressly raised by this case.

Petitioners submit that the issues noted above warrant plenary review of the Ninth Circuit's decision. In addition, the Court's recent grant of certiorari in *Minnick v. California Dept. of Corrections,* No. 79-1213 (cert. granted July 2, 1980), may effect the appropriate disposition of this petition. While the basis for certiorari in *Minnick* is not entirely clear, that case appears to raise, among other issues, the propriety of a race-conscious program adopted by a state entity. It does so, however, against a record devoid of findings of past discrimination such as supported the affirmative action program in issue in the instant case. To the extent the absence of such findings emerges as critical to the validity of the program in *Minnick,* consideration of this case either in conjunction with, or subsequent to,

Minnick may assist in defining the contours of that holding. At the very least, we submit that it would be appropriate to hold this petition pending the decision in *Minnick* and the disposition of the petition for certiorari in *Detroit Police Officers Assn. v. Young, supra.*

I

The Petition Should Be Granted To Consider Whether A State Constitutionally May Prohibit All Race-Conscious Remedies For Prior Discrimination

Under the decision below, California's so-called "low bid" law flatly prohibits the District's minority participation program notwithstanding the Board's findings of actual discrimination in construction contracts let by the District and the resistance of such discrimination to less-stringent methods of redress. While it is perhaps unfair to characterize the "low bid" law as "racially" motivated, there can be no question that it deprives the Board of the most effective,[5] if not the only,[6] meaningful remedy for this identified discrimination. By upholding the constitutionality of that law, the lower court acted contrary to decisions of this Court holding that state laws which categorically prohibit race-conscious remedies for past discrimination are invalid.

In *North Carolina Board of Education v. Swann,* 402 U.S. 43 (1971), this Court held that a North Carolina statute which prohibited the busing of students on account

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[5]See Finding 1, (App. E, Exh. A, pp. 3-4), which indicates that during the period in which the minority participation program was in effect minority-participation increased from less than 5% to 33.4%.

[6]The Board had long attempted, through programs of voluntary assurance to remedy the severe underutilization of minority-owned businesses in District projects. The failure of these efforts is chronicled in the Board's findings and elaborated in the record before the District Court. See Finding 3, (App. E, Exh. A, p. 2).

of race "or for the purpose of creating a balance or ratio of race . . ." was unconstitutional because it interfered with the ability of school authorities to remedy existing patterns of discrimination within the district. Starting with the premise that "state policy must give way when it operates to hinder vindication of federal constitutional guarantees," the Court spoke in terms applicable to the instant case:

> The legislation before us flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools. The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the *Swann* case. But more important the statute exploits an apparently neutral form to control school assignment plans by directing that they be "color blind"; that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education,* 347 U.S. 483 (1954). Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.
>
> Similarly, the flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in *Swann,* the Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting

> points in shaping a remedy. An absolute prohibition against use of such a device—even as a starting point —contravenes the implicit command of *Green v. County School Board,* 391 U.S. 430 (1968), that all reasonable methods be available to formulate an effective remedy.

402 U.S. at 46-47.

At the very least, *Swann* compels the conclusion that a state law which operates to limit the remedies available to ameliorate the effects of identified past constitutional or statutory violations is itself unconstitutional. Petitioners submit that the "low bid" law, like the anti-busing statute in *Swann,* constitutes just such an effort by the legislature to interdict the use of a particular remedy, and thus cannot be sustained.

The only conceivable sense in which the instant case and *Swann* differ is that in *Swann* the underlying findings of past discrimination were made by the District Court whereas here the School District itself identified the past wrongful conduct which it then sought to remedy. Prior decisions of this Court, however, clearly establish that judicial findings of past discrimination are not a required predicate for the imposition of race-conscious remedies. See, e.g., *McDaniel v. Barresi,* 402 U.S. 39 (1971). Indeed, Justice Powell noted in his separate opinion in *Bakke* that preferential remedies had been approved when supported by judicial, *legislative,* or *administrative* findings of constitutional or statutory violations. 438 U.S. at 300-302. And the opinion of Justices Brennan, Marshall, White and Blackman in that case highlighted the self-defeating nature of any requirement that judicial findings are necessary to support imposition of race-conscious remedies:

> [T]he requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of law. And, our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action.

438 U.S. at 364. See also, *Swann v. Charlotte Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971) ("Judicial authority enters only when local authority defaults.").

The significance of the Ninth Circuit's departure from the principles articulated in *Swann* (and like cases[7]) is surely evident. If it is open to a state, or local, legislature to prohibit affirmative action even where—as here—there exists an identified and on-going pattern of racial exclusion, the ability to undertake affirmative action programs will be seriously undermined. This is likely to be true not only of local government programs, such as the District policy in issue here, but of voluntary private programs as well. For example, the type of program upheld in *Weber*[8] would seemingly be subject, under the Ninth Circuit's view, to restriction by state or local legislation forbidding such "affirmative action". Petitioners submit that such a significant limitation on constitutional prerogatives only recently recognized should not be accepted without careful review by this Court.

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[7]See, *e.g., Chropowicki v. Lec,* 402 U.S. 935 (1971); *Borders v. Rippy,* 247 F.2d 268 (5th Cir. 1957).

[8]443 U.S. 193 (1979).

II

The Petition Should Be Granted To Consider the Existence of a Constitutional Duty to Engage in Affirmative Action As A Remedy for Past Discrimination and to Resolve the Conflict on that Question Between the Sixth and the Ninth Circuits

Certiorari should also be granted to consider the nature and extent of a non-judicial entity's obligation to eliminate the effects of past discrimination which it has identified. While this precise issue has never been directly considered by the Court, the novel distinction drawn in the decision below between so-called "reshuffle" and "stacked deck" remedies constitutes a major departure from prior decisions. Moreover, the opinion below is directly contrary on this point to the recent decision of the Sixth Circuit in *Detroit Police Officers Association v. Young,* 608 F.2d 671, 691-92 (6th Cir. 1979), *petition for certiorari pending,* No. 79-1080.

Prior to the decision below, it seemed well-established in discrimination cases that, once a constitutional or statutory violation had been identified, "courts ha[ve] not merely the power but the *duty* to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States,* 380 U.S. 145, 154 (1965) (emphasis supplied). See also, *e.g., Green v. County School Board,* 391 U.S. 430, 438 (1968) (School Boards have an "affirmative duty" to "take whatever steps might be necessary" to eliminate racial discrimination); *McDaniel v. Barresi,* 402 U.S. 39, 41 (1971). Nor is this principle limited to school desegregation litigation. Discrimination cases in other areas have established that the constitutional duty to remedy past discrimination includes the obligation to employ race-

conscious remedies if necessary "to make [the victims] whole for injuries suffered on account of" past statutory or constitutional violations. *Regents of the Univ. of California v. Bakke,* 438 U.S. 265, 301 (1978) (opinion of Justice Powell), quoting *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975).

In addition, *Bakke, Weber* and, most recently, *Fullilove,* seem to make it clear that the authority to remedy past discrimination extends not merely to the courts but also to other legislative and administrative bodies.

From these two lines of cases, it would appear to necessarily follow that once a government agency has identified discrimination in areas of its legal responsibility,[9] that entity is not merely permitted, but *required,* to take whatever action is appropriate to remedy effectively the unlawful exclusion. Certainly that was the conclusion reached by the Sixth Circuit in *Detroit Police Officers Association v. Young, supra,* where the court rejected the contention that an affirmative action plan implemented by the Detroit Police Department violated 42 U.S.C. § 1981 on the ground that "the constitution not only permits but *requires* race-conscious action to remedy a constitutional violation." 608 F.2d at 691-92 (emphasis added). Indeed, it would seem

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[9]Lest there be any question on this point, the Board was affirmatively charged by state law with undertaking all school district construction projects, including the letting of contracts therefor, and the determination of the terms and conditions of such contracts. See, e.g. Calif. Educ. Code §§ 35160, 35270, 39170, 39172 & 39173; *Hall v. City of Taft,* 47 Cal.2d 177, 184-85, 302 P.2d 574 [1956]; *Berkeley Unified School District v. James I. Barnes Constr. Co.,* 112 F.Supp. 396, 399 [N.D. Cal. 1953]. Thus, to the extent that such contracts resulted in the unlawful exclusion of minorities, the responsibility therefor—as well as the duty and ability to eradicate the discrimination—lay with the District and its governing Board.

incongruous to suggest that a non-judicial entity (such as the Board here), having found that minority businesses were being unlawfully excluded from its school construction projects, is under no duty to remedy that exclusion by whatever means may be necessary to do so.[10] Since a court would be required[11] to impose such a remedy once a violation were shown, it would seem entirely inconsistent with the principles of fashioning effective relief and of reducing the need for litigation in favor of voluntary solutions, to hold that a non-judicial entity's obligation to eliminate discrimination is significantly more restricted than that of a court.

That is, however, the effect of the distinction between "reshuffle" and "stacked deck" programs drawn by the Court of Appeals here. That distinction creates a hitherto unrecognized difference between types of remedies and consigns affirmative action (which is, effectively, what is meant by the Ninth Circuit's antagonistic euphemism "stacked deck") to some jurisprudential purgatory. Nothing in this Court's race discrimination decisions suggests the pro-

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[10]And, as a corollary, that it may therefore be prohibited by state law from taking such action. See Section I of this Petition, *supra*.

[11]The decision below appears not even to accept the proposition that courts have a constitutional obligation to vindicate the rights of the victims of discrimination through imposition of race-conscious remedies when necessary. While the Ninth Circuit acknowledges that such remedies have sometimes been mandated by the judiciary, it finds their basis not in any underlying constitutional duty, but in the "equitable" powers of the courts. (App. A, pp. 24-26). Admittedly, their equitable powers permit the courts flexibility in shaping remedies, but not until the decision below had these powers been perceived as allowing courts to require of litigants what the Constitution does not.

priety of that distinction.[12] To the contrary, it has previously been considered well-established that the scope of the constitutionally required remedy is determined in each case "by the nature and extent of the . . . violation," *Milliken v. Bradley*, 418 U.S. 717, 744 (1974).

The net result of the lower court's holding is to render illusory the efforts of local agencies such as the Board here effectively to eliminate racial discrimination. To secure effective relief under the decision below, it would be necessary for the victims of the discrimination to bring litigation so that a court might discharge *its* obligation to impose an effective, race-conscious remedy for the unlawful conduct.

Petitioners thus submit that the Ninth Circuit's departure from established doctrine in this area in an unfortunate one not only because of the results in this particular case, but also because it creates an unwarranted jurisprudence of "remedies" in race discrimination litigation. In view both of that fact and the conflict between the decision below and the Sixth Circuit's position in *Young, supra*,[13] petitioners submit that the issue is of sufficient importance to justify review by this Court.

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[12]Both the "reshuffle" and "stacked deck" labels implicitly assume that the initial "deck" was a *full* one which only requires further shuffling or rearranging. However, with discrimination like that at issue here, the assumption that one starts with a full deck is simply not correct. Minority contractors were *excluded* from the deck and what is required is neither "reshuffling" nor "stacking" it, but instead simply returning to the deck those cards (contractors) impermissibly excluded. By referring to this process of making the deck complete as "stacking" it—the court not only misconceives the nature of the underlying discrimination but also gives an illicit connotation to the remedy.

[13]The contrary conclusion regarding the existence of a constitutional duty reached in *Young* was expressly considered and rejected by the Ninth Circuit. See App. A, p. 24, n.9.

III

The Petition Should Be Granted to Consider the Authority of Governmental Entities Other Than Congress to Adopt Race-Conscious Remedies For Past Discrimination

In *Fullilove v. Klutznick, supra,* this Court upheld the constitutionality of an affirmative action plan implemented by Congress for the express purpose of remedying past discrimination which it had identified. Because the program upheld in *Fullilove* was adopted by Congress, however, the Court's holding necessarily created a further question as to how the principles articulated in that case would be applied to preferential programs implemented by other governmental entities.[14] The instant case expressly presents that issue and does so in a context which will allow the Court to resolve it with a maximum of clarity and precision.

Indeed, it is probably fair to say that, with the exception of the party responsible for adopting the program, the Minority Business Enterprise Program considered in *Fullilove* and the Board's Affirmative Action Policy in issue here are substantially identical in all other relevant particulars.[15] Both programs were predicated upon findings

[14]Justice Powell, in his concurring opinion in *Fullilove,* made these concerns explicit:

> "My view that this set-aside is within the discretion of Congress does not imply that other methods are unavailable to Congress. Nor do I conclude that use of a set-aside always will be an appropriate remedy or that selection of a set-aside by any other governmental body would be constitutional. See *Bakke,* 438 U.S. at 309-310. The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature of a governmental body." .... U.S. .... (1980).

[15]The only other arguable distinction is that the Board's program contemplated a 25% set-aside vs. the 10% in issue in *Fullilove.* However, this distinction does not bear at all upon the authority of the enacting body to undertake the program.

of past discrimination against minority owned businesses in the construction industry. Both were intended to redress that discrimination and both chose a specific minority set-aside as the most appropriate vehicle to accomplish that end. Thus, the only question left unanswered is whether the Board shares with Congress the authority to implement such a program.

This issue is seemingly also presented by *Minnick v. California Dept. of Corrections, supra,* and, perhaps less clearly, by *Detroit Police Officers Ass'n v. Young, supra.* However, the record in *Minnick* evidently contains no express findings of prior discrimination, thus making it unlikely that the case will permit the Court to consider fully the nature or specificity of the findings necessary to sustain a race-conscious remedial program. Similarly, the complicated factual setting in *Young* as well as the fact-specific questions presented in that petition may obscure the general question—left open in *Fullilove*—of who other than Congress possesses the authority to adopt affirmative action programs.

Petitioners submit that it may well be appropriate for this Court to treat this case together with *Minnick.* At the very least, we submit that it should be held pending disposition of that case and the certiorari petition in *Young.*

CONCLUSION

For the foregoing reasons, this petition should be granted.

Dated: August 18, 1980.

Respectfully submitted,
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Of Counsel

(Appendices Follow)

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, et al., Plaintiffs-Appellees, vs.	No. 77-2507
SAN FRANCISCO UNIFIED SCHOOL DISTRICT; SAN FRANCISCO BOARD OF EDUCATION, et al., Defendants, and,	No. 77-2750
NATIONAL ASSOCIATION OF MINORITY CONTRACTORS and MINORITY CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, Intervenors-Appellants.	No. 77-3124
	No. 77-3764

Appeal from the United States District court for the Northern District of California.

Before CHOY and HUG, Circuit Judges, and RICHEY, District Judge.*/

CHOY, Circuit Judge:

Associated General Contractors (AGC) sued to challenge the "affirmative action policy" adopted by the San Francisco Board of Education (Board). Under the policy, bidders for construction contracts let by the San Francisco Unified School District (School District) must be minority general contractors or must utilize minority subcontractors for 25% in dollar volume of the contract work.1/ AGC asserts that this policy violates 42 U.S.C. §§ 1981 and 1983 and

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*/ The Honorable Mary Anne Richey, United States District Judge for the District of Arizona, sitting by designation.

1/ The policy defines as a member of a minority anyone who is not European or apparently, of Semitic ancestry. See 431 F. Supp. at 856. There is no special provision for women.

the Fourteenth Amendment, and California law as well.

The district court held that such a set-aside for minority contractors on public works was illegal, except as to projects funded with federal money given on condition that 10% or more of the money would go to minority contractors. We agree.

I. Statement of the Case

The Board of Education adopted a resolution in March 1977 finding a present need for an affirmative action policy to overcome the effects of past discrimination in the awarding of School District construction subcontracts. The Board then adopted the policy outlined above. It applied to general contractors bidding on all school construction projects worth over $100,000. Relief from the policy was available only when the Board was satisfied

that an ineligible contractor had "taken every possible measure to comply" with the policy, or that it was "not practicable in the best interests of the District to require compliance in the specific case."

The policy declared that noncomplying contractors were not "responsible bidders" under California Education Code § 15951 (now §39640). That statute requires school construction contracts to be awarded to the "lowest responsible bidder."

The district court enjoined the School District from enforcing the policy, on the ground that "responsibility" under the state law referred only to a bidding contractor's financial and physical ability to do the work. The court forbade the School District to award contracts to other than the "lowest responsible bidder" merely because the lowest bidder was of the wrong

parentage and refused to accede to the School District's views on socially desirable subcontracting. Associated General Contractors v. San Francisco Unified School District, 431 F. Supp. 854 (N.D. Cal. 1977) (refusing to dissolve preliminary injunction; permanent injunction entered later).

At about the same time, the federal government granted the School District $8,000,000 in public works funds under the Public Works Employment Act of 1977, Pub. L. No. 95-28, 42 U.S.C. §§ 6701-6710, which requires that the recipient entity give "satisfactory assurance to the Secretary [of Commerce] that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises," 42 U.S.C. § 6705(f)(2).

The Board then adopted a second affirmative action policy, nearly identical

to the first (including a minority set-aside of 25% rather than the federally-required minimum of 10%) except that it applies only to projects financed with Public Works Employment Act funds.

AGC applied for a contempt order to vindicate the earlier injunction. The district court dismissed the proceeding without prejudice. However, it issued an order changing the Board's 25% minority participation requirement on federally-aided projects to a 10% requirement. The court then modified its earlier injunction so as not to prohibit the new policy, as altered.

The intervening Minority Contractors appeal from the entry of the permanent injunction against the first affirmative action policy; the School District and the Board appeal from the reduction from

25% to 10% of the set-aside in projects funded through the Public Works Employment Act.

II. Issues

This appeal raises five issues: (1) whether the district court had jurisdiction to test under state law the validity of the Board's policy; (2) whether the manner in which the court reduced the set-aside on Public Works Employment Act projects violated due process; (3) whether California Education Code § 39640 prohibits the Board's affirmative action policy; (4) if state law does prohibit it, whether the state law is unconstitutional as applied to do so; and (5) if the affirmative action policy is not prohibited by any valid state law, whether the policy itself violates the Constitution.

A. Jurisdiction

The district court had jurisdiction to enter its injunction and order. AGC's attacks on the set-aside policy based on the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983[2/] are substantial federal claims -- so substantial that the Supreme Court has agreed to hear similar claims this term in Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978), cert. granted sub nom. Fullilove v. Kluztnick, 441 U.S. 960, 99 S. Ct. 2403, 60 L. Ed. 2d 1064 (1979). Thus 28 U.S.C. § 1331 provided jurisdiction over the federal claims. The district court also had pendent jurisdiction over the state-law

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2/ The School District is a political subdivision of the State of California, not of any city or county. Therefore, it clearly is a "person" subject to §§ 1981 and 1983.

question whether the Board had authority under state law to adopt and enforce its affirmative action policy. See Hagans v. Lavine, 415 U.S. 528, 536, 94 S. Ct. 1372, 1378, 39 L. Ed. 2d 577 (1974). And, as it did here, the district court could properly deal with the state question first, particularly when that course avoided a very difficult constitutional question (the Fullilove question). See id. 543, 94 S. Ct. at 1382.

B. Due Process

The School District and the Board are the only parties appealing the district court's downward revision of the minority set-aside in the second affirmative action policy (relating to federally-funded projects). They originally complained that the manner in which this

was done deprived them of their due process rights to notice and opportunity to be heard. However, in their reply brief they explicitly "abandoned and dismissed that portion of this appeal which . . . [a]lleges denial of due process on hearing In Re Contempt."

Even if we did not hold them to this waiver, we would find no due process violation. The effect of what the district court did was to create an exception to the injunction, not to broaden its coverage. The illegality of a 25% set-aside, to the extent not required by federal law, was law of the case; extensive reargument was not required.

C. Authority Under State Law

The district court held that under state law the affirmative action program

was void because the Board had no authority to adopt it. A federal court's role in such a case is to give state laws the construction it believes the highest state court would give them. In this inquiry we give substantial deference to the opinion of a district court sitting in the state. Lewis v. Anderson, 615 F.2d 778, 781 (9th Cir. 1979); Smith v. Sturm, Ruger & Co., 524 F.2d 776, 778 (9th Cir. 1975). We agree with the district court.

The authority of school boards in California derives from California Education Code § 35160, which authorizes the adoption of any program that is not in conflict with the purposes for which school districts are established and "is not in conflict with or inconsistent with, or preempted by, any law."

Because the Board's affirmative action program conflicts with California Education Code § 39640, we hold that § 35160 does not authorize it. Section 39640, the "low bid law," reads:

> The governing board of any school district shall let any contracts involving an expenditure of more than eight thousand dollars ($8,000) for work to be done or more than twelve thousand dollars ($12,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise.

While no California court has considered the issue whether a school board may adopt a program such as the one at issue here consistent with § 39640, the California Supreme Court has circumscribed the meaning of "lowest responsible bidder" in another context.

In Inglewood-Los Angeles County Civic Center Authority v. Superior Court, 7 Cal. 3d 861, 500 P.2d 601, 103 Cal. Rptr. 689 (1972), the court held that California Government Code § 25454, a statute requiring that counties award public contracts to the "lowest responsible bidder," did not embody a concept of "relative superiority" which would allow the county to award the contract to the next-to-lowest bidder because he was "more qualified" than the lowest bidder. The court said, "a contract must be awarded to the lowest bidder unless it is found that he is not responsible, i.e., not qualified to do the particular work under consideration." 7 Cal. 3d at 867, 500 P.2d at 604, 103 Cal. Rptr. at 692 (emphasis added.) Cf. Raymond v. Fresno City Unified School District,

123 Cal. App. 2d 626, 267 P.2d 69 (1954) (board could consider poor workmanship on previous job in deciding whether plaintiff was "lowest responsible bidder" under predecessor of § 39640); West v. Oakland, 30 Cal. App. 556, 159 P. 202 (1916) (city could consider "quality, fitness, and capacity to the particular requirements of the proposed work" under a city charter provision requiring public contracts be awarded to "lowest responsible bidder").[3/]

3/ Compare Department of General Services v. Superior Court, 85 Cal. App. 3d 273, 147 Cal. Rptr. 422 (1978), which involved a special statute exempting certain work on the state capitol from the "lowest responsible bidder" requirement but subjecting it to "competitive bidding." The contract-letting body adopted an affirmative action program much like the one in the present case. The court of appeal vacated summary judgment for the "majority" contractors and remanded for a determination of whether or not proper findings had been made.

We do not think that the California Supreme Court would construe the term "lowest responsible bidder" as used in Education Code § 39640 differently from the construction it gave the same language in Inglewood; the statutes are virtually identical. Therefore, we hold that § 39640 must be construed to prohibit the Board from considering any factor other than the amount of the bid, the minimum qualifications bidder as to financial ability and skills to complete the job successfully, and the quality of the bidder's past work.[4/]

4/ In Bakke v. Regents of the Univ. of Calif., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680, (1976), aff'd in part and rev'd in part, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978), the California Supreme Court showed itself unfriendly to quota-type affirmative action programs of state educational bodies. That court recently has narrowly upheld a governmental quota-type affirmative action hiring program, where the minority underrepresentation was due to the government

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

D. Constitutionality

Appellants argue that if the low bid law prohibits the Board's policy, the law is unconstitutional as applied.

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

entity's own past discrimination. Price v. Civil Serv. Comm'n. __ Cal. 3d __ 604 P.2d 1365, 161 Cal. Rptr. 475 (1980). Since the School District itself has not been guilty of past discrimination, we think the California Supreme Court would not be inclined to authorize the Board's affirmative action program; instead, we think the court would strictly construe the low bid law, forbidding the program.

We would not deny that under California law a school board may require a bidder to agree not to violate antidiscrimination laws. See 42 Cal. Op. Atty. Gen. 169, 171 (1963). The Board's affirmative action policy is not a state or federal statute, however, but merely represents the Board's beliefs on a controversial social question. Refusal to accede to such beliefs is not a ground, under California law, for exclusion from public contracts. See 57 Cal. Op. Atty. Gen. 574 (1974) (attempt to bar non-union shops from bidding on state printing contracts).

1. Duty of Affirmative Action

a. United States Constitution

Appellants boldly claim that the Constitution imposes upon the School District a legal duty to take affirmative action to remedy the effects of past discrimination, and that any state law that prevents such action therefore violates the Supremacy Clause.

We think it is useful and necessary to distinguish between the two major types of positive governmental action taken on behalf of minorities.[5/] First, there are "reshuffle" programs, in which the state neither gives to nor withholds from anyone any benefits because of that person's group status, but rather ensures that everyone in every group enjoys the same

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5/ We do not include in either category those laws which command the state to take no action that discriminates against minorities. E.g. 42 U.S.C. §§ 1981-1983.

rights in the same place.[6/] The most common examples are school desegregation cases and programs.

Second, there are "stacked deck" programs, in which the state specifically favors members of minorities in the competition with members of the majority for benefits that the state can give to some citizens but not to all.[7/] This category includes affirmative action

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6/ E.g. McDaniel v. Barresi, 402 U.S. 39, 91 S. Ct. 1287, 28 L. Ed. 2d 582 (1971) (school desegregation); Zaslawsky v. Board of Education, 610 F.2d 661 (9th Cir. 1979) (teacher assignment); cf. Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed.2d 506 (1964) (legislative reapportionment required by "one person, one vote" standard).

7/ We use the term "stacked deck" to connote that one contestant has been given a better than-equal chance to win. We do not intend by the use of this term to suggest that all such programs are bad or illegal. It might well be permissible

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programs of both the quota and "positive-factor" varieties[8/] (but not programs that merely encourage more minority persons to apply for state-conferred benefits).

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for the state to stack the deck when one player is a novice taking on an expert, or when one player has only a few chips because the deck has been stacked in favor of his opponent for years. On the other hand, even if one stacks the deck for reasons that are virtuous, remedial, or beneficial in the long run, one cannot analyze the situation without admitting the reality that the deck is now stacked.

The term "reshuffle" suggests both the physical interposition of the various cards, and the creation of equality of opportunity for the players by the elimination of an unfair stack.

8/ See e.g., Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 57 L. Ed. 2d 750 (1978), which struck down a program that limited whites to 84% or fewer of the positions in a medical school class, but approved a program that made a minority applicant's race one of several positive factors that could be considered in the admissions process.

It is well established that the state has an affirmative constitutional duty to use "reshuffle" programs to cure the effects of past or present de jure segregation. Brown v. Board of Education, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955) (Brown II); United States v. Montgomery County Board of Education, 395 U.S. 225, 89 S. Ct. 1670, 23 L. Ed. 2d 263 (1969) (faculty assignment); cf. Dayton Board of Education v. Brinkman, 433 U.S. 406, 413, 97 S. Ct. 2766, 2772, 53 L. Ed. 2d 851 (1977) (no duty to desegregate schools where cause is past de facto segregation). Where such a duty exists, remedies that merely avoid further overt state discrimination are inadequate if they fail to effect an immediate reshuffle. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S.

1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971); Green v. County School Board, 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968).

On the other hand, there is no constitutional duty to engage in "stacked deck" affirmative action.[9/] In our view, the reason for this is that

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9/ To the extent that the Sixth Circuit has relied on "reshuffle" cases to find a constitutional duty of states to take "stacked deck" affirmative action to eliminate the effects of past discrimination, see Detroit Police Officers' Assn. v. Young, 608 F.2d 671, 691 (6th Cir. 1979). Petition for cert. filed, ___ U.S. ____, ____ S. Ct. ___, ____ L. Ed. 2d ____, 48 U.S.L.W. 3558 (U.S. Jan. 10, 1980) (No. 79-1080), we disagree.

Some cases uphold or impose "stacked deck" affirmative action under federal statutes such as Title VII of the Civil Rights Act of 1964 and the Public Works Employment Act of 1977; these cases are irrelevant to our discussion of constitutional duty.

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

"stacked deck" programs trench on Fourteenth Amendment values in ways that "reshuffle" programs do not. For example:

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We also think that United Jewish Organizations v. Carey, 430 U.S. 144, 97 S. Ct. 996, 51 L. Ed. 2d 229 (1977), is not adverse to our position. There, the Court upheld election redistricting, undertaken to satisfy the Voting Rights Act of 1965, that deliberately split a Hasidic Jewish community between two districts so as to assure uniform nonwhite majorities in both districts. Although no Justice's opinion commanded a majority of the Court, it is clear that the redistricting took race into account, was intended to help nonwhites, and had the effect of disadvantaging the "discrete and insular" Hasidim. However, close examination proves that this was just another "reshuffle" case, because no individual Hasid was placed in a district that violated the one-person-one-vote rule, and the petitioners denied that there was a right to maintain permanently in a single district the community's bloc voting power, id. at 154 n.14, 97 S. Ct. at 1004 n.14. It is well established that competent agencies may take race into account in "reshuffle" contexts.

(1) "Stacked deck" programs offer the possibility that the official discrimination is or may become invidious. "Reshuffle" programs are inherently not invidious.

(2) In a "stacked deck" operation, a scarce benefit goes to one individual, while another individual is totally deprived of it. "Reshuffle" programs not only provide something to everyone, they provide the same thing (e.g., education in an integrated school) to everyone.

(3) In the short run, a "stacked deck" program works wholly to the benefit of certain members of one group, and correspondingly to the harm of certain members of another group. "Reshuffle" programs theoretically provide some benefits also to the whites, for their exposure to the minorities is expected to

bring understanding and wisdom. See Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 93 S. Ct. 364, 34 L. Ed. 2d 415 (1972). But "stacked deck" programs do not provide even collateral benefits to the disadvantaged whites.

(4) A "stacked deck" program arguably deprives citizens of rights (e.g., the right to make contracts, free from racial discrimination; cf. 42 U.S.C. § 1981), whereas a "reshuffle" program does not (e.g., no "right" to attend a segregated school).

It is true that courts, after making judicial findings of past or present discrimination and a need for affirmative action, have sometimes imposed "stacked deck" affirmative action remedies on public bodies for Fourteenth Amendment

violations.[10/] But the basis for such remedies is the broad powers of equity, not an initial duty of those bodies to have undertaken affirmative action; it

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10/ E.g. Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc) (highway patrolmen), cert. denied, 419 U.S. 895, 95 S. Ct. 173, 42 L. Ed. 2d 139 (1974); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973) (police); Pennsylvania v. O'Neill, 473 F.2d 1029 (3d Cir. 1973) (en banc: equally divided court) (police); Carter v. Gallagher, 452 F.2d 315 (8th Cir.) (en banc) (firemen), cert. denied, 406 U.S. 950, 92 S. Ct. 2045, 32 L. Ed. 2d 338 (1972).

Note that these cases involve police, fire, and highway patrol departments, that cannot perform effectively unless the public accords them cooperation and goodwill. Cooperation is unlikely if the public views them as symbols of discrimination. Thus, there is an interest in the immediate and visible integration of those departments.

However, there is no special functional value in a physical show of integration in this case, which involves the ownership of subcontracting firms in school construction projects.

is not true that the substance of a post-verdict remedy necessarily was "constitutionally or legally required" before verdict. United States v. Montgomery County Board of Education, 395 U.S. 225, 236, 89 S. Ct. 1670, 1676, 23 L. Ed. 2d 263 (1969).

No authority impels us to find a constitutional duty to take "stacked deck" affirmative action. If the Supreme Court believed that such a duty existed, it surely would have said so in Regents of the University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). On the contrary, even the Bakke dissenters admitted that a school "is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program." Id. at 379, 98 S. Ct. at

2794 (Brennan J. dissenting). Similarly, we think it significant that in all cases in recent years where the permissibility of "stacked deck" programs was sharply attacked, no court has ventured to still all the controversy by proclaiming that not only is such affirmative action permitted, it is actually required by the Constitution.

There is no doubt that the enactors of the Fourteenth Amendment did not intend it to require "stacked deck" affirmative action programs. Moreover, it is difficult to understand how the literal guarantee that "No State shall . . . deny to any person within its judisdiction the equal protection of the laws" could require a state to disadvantage one citizen and aid another in their competition for a scarce benefit. And

even acknowledging that courts have used the general language of the Fourteenth Amendment to import into it contemporary theories of desirable social policy, we decline to import into the Amendment a "stacked deck" affirmative-action requirement. The pluses and minuses of "stacked deck" programs are far too uncertain and controversial for us to remove the question from the legislative sphere without grossly overstepping the appropriate limits of the judiciary in the American system.

Therefore, because no precedent suggests that the Fourteenth Amendment creates a duty to engage in "stacked deck" affirmative action, and no valid reason appears for discovering within the Amendment such a duty, we hold that no such constitutional duty exists.

Moreover, even if the argued-for constitutional duty exists, it could not come into play until proper findings were made of discrimination and the need for affirmative action to redress it. Such findings were not and could not be made in this case, as we show infra.

b. California Constitution

Nor is "stacked deck" affirmative action required by the California Constitution. It is true that Crawford v. Board of Education, 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976), held that school boards have an affirmative duty under the state constitution to take "reshuffle" affirmative action to alleviate racial segregation in the public schools, regardless of whether its root cause was de facto or de jure segregation or anything else. However,

Crawford (1) confined itself to the alleviation of disproportionate minority-student enrollment in public school; (2) refused to set numerical quotas even in the "reshuffle" desegregation context; and (3) did not authorize "stacked deck" affirmative action in any context. Therefore, there is no reason to think that the California Constitution compels school boards to engage in "stacked deck" affirmative action geared to numerical quotas, especially in areas other than school enrollment.

Appellants assert that the affirmative action program is necessary to ensure equal educational opportunities for minority students in vocational work/study programs. While the lack of opportunities in such programs is an educational concern, the availability of

post-graduation employment is not. Schools teach; what happens to the graduates is the province of other agencies. "The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 22, 91 S. Ct. 1267, 1279, 28 L. Ed. 2d 554 (1971).

Besides, if the Board truly were concerned with education, rather than employment, its affirmative action policy would merely compel contractors to offer work experience to all vocational education students, regardless of race. Instead, the policy says nothing about the education or hiring of any minority

workers, student or non-student; its concern is that employers be minority. Even if the Board's policy might have the effect of enhancing education opportunities for minority students, we find that the previous inequality was not so great, and the ameliorative effect would not be so pronounced, that the policy is constitutionally compelled.

c. Irretractability

Appellants argue further that once a program is proven in practice to dispel discrimination, it is unconstitutional to withdraw from it. By this logic, even if the Board was not initially compelled by the Constitution to adopt its affirmative action policy, it is now compelled to continue it.

Apparently, the Supreme Court's position is that it is a constitutional

violation for a school board to rescind previous action if and only if the board was under a constitutional duty to take the action initially. Dayton Board of Education v. Brinkman, 433 U.S. 406, 414, 97 S. Ct. 2766, 2772, 53 L. Ed. 2d 851 (1977). Because we hold that the Board here had no constitutional duty to adopt its affirmative action policy, the Constitution does not forbid the Board to return to its former race-neutral policy.

In support of their argument, appellants cite only Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967). There the state proposed to withdraw a requirement that contractors sign assurances that they would not discriminate against black workers. Given the state's knowledge that this would result in only whites being hired, the court properly

found unconstitutional state action. But in this case no state agency is signalling private parties that they may disregard statutory antidiscrimination laws, so Ethridge is inapposite.[11/]

11/ Similarly, state constitutional provisions that have the effect of repealing fair housing statutes are prohibited by the United States Constitution because they are tantamount to state encouragement of private discrimination. Reitman v. Mulkey, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967); Hunter v. Erickson, 393 U.S. 385, 89 S. Ct. 557, 21 L. Ed. 2d 616 (1969) (municipal equivalents). But here, the state retains many laws forbidding private discrimination against minority subcontractors and generals, so to withdraw the affirmative action policy would not be to encourage discrimination. Also, in Reitman and Hunter the Supreme Court was concerned that anti-discrimination statutes were being supplanted by pro-discrimination constitutional provisions, which expressed the basic policy of the state and could not be repealed as easily as statutes could. This factor is not present here.

Therefore, even though when the Board's affirmative action policy was in effect the percentage of subcontract dollars won by minority firms rose to 33%, we hold that the Board has no constitutional obligation to maintain the policy.[12/]

2. Power to Prohibit Affirmative Action

Appellants argue that, even if the affirmative action policy is not constitutionally compelled, the state law prohibiting it is nonetheless unconstitutional.

12/ The same result obtains under the California Constitution. In Santa Barbara School Dist. v. Superior Court, 13 Cal. 3d 315, 530 P.2d 605, 118 Cal. Rptr. 637 (1975), the California Supreme Court upheld the repeal by initiative of specific "racial balance" quotas for public schools, on the ground that the Constitution required only nonsegregation, rather than any numerical quota. Thus the quotas could be repealed even if they had resulted in achieving the racial ratios that they dictated.

a. Legislative Incompetence Per Se

Appellants first argue that voluntary, local affirmative action programs such as the one here are extremely useful tools for eliminating the effects of past discrimination and for raising minorities to a position of economic and sociological equality, and that therefore it is per se unconstitutional for a state to ban them.

Whether courts might think that voluntary affirmative action should be a favored policy is of no moment. There is no constitutional duty for the state or the Board to take affirmative action here.[13/] This holding would be

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13/ The cases seem to indicate that state statutes forbidding public bodies to do something are unconstitutional per

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

vitiated if on constitutional grounds we denied the state the power to decide that certain policies outweigh the policy of affirmative action, and to enforce that decision against the agencies it has created. We decline to do so.

Appellants' position boils down to an assertion that if a state legislature and a state agency disagree about the

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[FOOTNOTE CONTINUED FROM PRECEDING PAGE]

se only if the bodies had an affirmative constitutional duty which cannot be effectively fulfilled because of the statute. Thus, state statutes prohibiting busing are unconstitutional only because they remove from school boards the sole or most effective way to fulfill their duty to desegregate the schools via "reshuffle" affirmative action. See North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45-46, 91 S. Ct. 1284, 1285-1286, 28 L. Ed. 2d 586 (1971); San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 955, 479 P.2d 669, 680, 92 Cal. Rptr. 309, 320, cert. denied, 401 U.S. 1012, 91 S. Ct. 1266, 28 L. Ed. 2d 549 (1971).

wisdom of affirmative action, the agency should prevail (if it is the entity in favor of affirmative action). This we cannot accept. The competent entity in such a situation is always the legislature, whose members are charged with responsibility and accountable to the people for such decisions. The Supreme Court has insisted that "explicit [legislative or Presidential] action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." Greene v.

McElroy, 360 U.S. 474, 507, 79 S. Ct. 1400, 1419, 3 L. Ed. 2d 1377 (1959).

"Stacked deck" affirmative action, the constitutionality and wisdom as social policy of which are sharply debatable, is precisely the kind of policy decision in which legislatures have the greatest advantage in competence over local agencies such as school boards. Therefore, we hold that it is constitutionally acceptable for a legislative determination to foreclose, as it does in this case, the Board from voluntarily adopting an affirmative action policy.[14/]

14/ Moreover, the contrary legislative determination fatally undermines the propriety of the Board's findings in support of its affirmative action policy. However, the Supreme Court has held that the quota-type affirmative action

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

b. Discriminatory Impact and Intent

Even if the low bid law is not unconstitutional per se because it removes the Board's authority under state law to take "stacked deck" affirmative action, it still must be tested under Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976).

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

is unconstitutional where not supported by "appropriate findings . . . made by judicial, legislative, or administrative bodies with competence to act." Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 325, 9 S. Ct. 2733, 2766, 57 L. Ed. 2d 750 (Brennan, J. dissenting); accord, id. at 307, 98 S. Ct. at 2757 (opinion of Powell, J.). See also id. at 421, 98 S. Ct. at 2815 (Stevens, J., concurring in the judgment) (interpreting the federal legislative determination, Title VI, to prohibit the University's voluntary affirmative action program). The Board's own (disqualified) findings are the only ones supporting its policy. Therefore, the low bid law effectively destroys the Board's constitutional as well as statutory authority to adopt an affirmative action policy.

Under Washington, "a law, neutral on its face and serving ends otherwise within the power of government to pursue, is [not] invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." Id. at 242, 96 S. Ct. at 2049. Even in cases involving so-called discriminatory impact, "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." Id. at 240, 96 S. Ct. at 2048.

The requirement of California Education Code § 39640 that school construction contracts go to the "lowest responsible bidder" obviously is on its

face race-neutral.[15/] Although the low bid law may have a disproportionate impact on minorities, this is not a case where the disparity of a law's impact "may for all practical purposes demonstrate unconstitutionality because . . . the discrimination is very difficult to explain on nonracial grounds," thus permitting an inference of discriminatory purpose. See 426 U.S. at 242, 96 S. Ct. at 2049. Nor, as we understand it, has the Board itself ever applied (or failed to apply) the low bid law with an invidious intent.

15/ We need not decide whether a statute explicitly singling out and prohibiting affirmative action programs would be facially neutral or would fall under the doctrine of Hunter v. Erickson, 393 U.S. 385, 89 S. Ct. 557, 21 L. Ed. 2d 616 (1969).

Obviously, when the low bid law was passed in 1917, its purpose was not to disadvantage racial minorities. It was designed to protect the public fisc by preventing public officials from awarding contracts uneconomically on the basis of special friendships. Cf. Miller v. McKinnon, 20 Cal. 2d 83, 88, 124 P.2d 34, 37-38 (1942) (purpose of competitive bidding on public contracts is to protect taxpayers from corruption and prevent waste of public funds.) Such friendships might be based on mutual fondness, bribery, political co-partisanship, racial/ethnic affinity, or any combination of these. It is highly unlikely that minority contractors of that day were in such positions of special friendship; instead, such arrangements harmed the racial outsiders. If anything, the

purpose of the low bid law was to help such outsider contractors.

Therefore, the low bid law passes the Washington v. Davis test, and must be upheld.

E. Constitutionality of the Policy

Even if the Board's policy was permissible under state law, or if the state law that prohibited the policy was unconstitutional, we would still have to test the policy itself against the standard of the United States Constitution before we could reverse the district court. Because of our disposition of the other issues, we need not reach this one, especially in light of the grant of certiorari to Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978), cert. granted sub nom. Fullilove v. Klutznick, 441 U.S. 960 99 S. Ct. 2403, 60 L. Ed. 2d 1064 (1979).

III. Conclusion

The Board lacked authority to adopt its affirmative action policy because the policy was inconsistent with the California low bid law. This application of the low bid law is constitutional.

Our opinion of July 16, 1979, slip op. at 2487, is withdrawn.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, et al.,	)	
Plaintiffs-Appellees,	)	
vs.	)	No. 77-2507
SAN FRANCISCO UNIFIED SCHOOL DISTRICT; SAN FRANCISCO BOARD OF EDUCATION, et al.,	)	
Defendants,	)	
and,	)	No. 77-2750
NATIONAL ASSOCIATION OF MINORITY CONTRACTORS and MINORITY CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA,	)	
Intervenors-Appellants.	)	

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, et al., Plaintiffs-Appellees,	
vs.	No. 77-3124
SAN FRANCISCO UNIFIED SCHOOL DISTRICT; SAN FRANCISCO BOARD OF EDUCATION, et al., Defendants-Appellants,	
and	No. 77-3764
NATIONAL ASSOCIATION OF MINORITY CONTRACTORS, and MINORITY CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, Intervenors.	ORDER

Before: CHOY and HUG, Circuit Judges, and RICHEY,* District Judge.

The panel as constituted in the above case has voted to deny the petition for

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*/ The Honorable Mary Anne Richey, United States District Judge for the District of Arizona, sitting by designation.

rehearing and a majority of the panel has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing en banc. F. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA; LATHING AND PLASTERING CONTRACTORS ASSOCIATION, SAN FRANCISCO AND SAN MATEO; PAINTING AND DECORATING CONTRACTORS ASSOCIATION OF SAN FRANCISCO, INC.; W.G. THOMPSON; ARNTZ BROTHERS, INC.; ARNTZ CONTRACTING COMPANY; CAHILL CONSTRUCTION CO.; CHRISTENSEN & FOSTER; DeNARDE CONSTRUCTION; ENGSTRUM & NOURSE; MARTINELLI CONSTRUCTION; PACIFIC COMPANY; WILLIAMS & BURROWS and FREDERICK MEISWINKEL, INC., Plaintiffs, vs. SAN FRANCISCO UNIFIED SCHOOL DISTRICT; SAN FRANCISCO BOARD OF EDUCATION; LEE S. DOLSON; SAMUEL MARTINEZ; MRS. JAMES W. ABRAHAMSON; Z.L. GOOSBY; EUGENE HOPP; JOHN A. KIDDER; and THOMAS A. REED, Defendants.	No. C-76-2244 SAW

NATIONAL ASSOCIATION OF MINORITY CONTRACTORS, and MINORITY CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, INC.,

Intervenors.

ORDERS ON MOTIONS, FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT OF PERMANENT INJUNCTION

Plaintiffs are unincorporated associations of general contractors and subcontractors engaged in the building and construction industry in San Francisco and contractors and subcontractors so engaged. Defendant San Francisco Unified School District (hereafter "District") is a duly organized public body consisting of the public schools in San Francisco. Defendant San Francisco Board of Education (hereafter "Board") is the responsible governing body of the District. Intervenors are National Association of Minority Contractors and

Minority Contractors' Association of Northern California, Inc.

On May 17, 1977, this Court granted a preliminary injunction prohibiting the Board from carrying out an Affirmative Action Policy which, briefly stated, would have required general contractors bidding for school construction contracts to employ nonwhite owned businesses for at least twenty-five percent of the general contract dollar bid. The details of the Policy are set out in the Court's Memorandum and Order of May 17, 1977.

The question then addressed was whether the Board has the "legal authority to proclaim and carry out the Affirmative Action Policy." Defendants and intervenors contended that legislative authority to lay down the Policy was granted by California Education Code § 15591, now recodified as

California Education Code § 39640, which reads:

> The governing board of any school district shall let any contracts involving an expenditure of more than five thousand dollars ($5,000) for work to be done or more than eight thousand dollars ($8,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise. (Emphasis added.)

They argued that a bidder who would not comply with the Board's Affirmative Action Policy could not be deemed "responsible" within the terms of section 39640. Plaintiffs, of course, disagreed. After analyzing all authorities cited by the parties, the Court concluded that section 39640 does not empower the Board to enact and carry out its Affirmative Action Policy.

Defendants and intervenors now urge reconsideration and move for summary judgment. Defendants move alternatively for a stay of enforcement of the preliminary injunction pending appeal. Plaintiffs countermove for partial summary judgment and entry of a permanent injunction in light of the Order of May 17.

All but one of the authorities cited and arguments made by defendants and intervenors have already been considered by the Court and rejected. However, they now assert that a statute, not previously cited to the Court, grants the legislative authorization which the Court had found lacking. That statute, California Education Code § 35160, states:

> On and after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which

> is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established.

Defendants and intervenors now contend that the question properly before the Court is not that addressed in the Memorandum and Order of May 17, i.e., whether section 39640 authorizes the Board to adopt an Affirmative Action Policy, but whether section 39640 limits the general power granted the Board by section 35160. Having carefully considered their current arguments, the Court concludes that the preliminary injunction entered on May 17, 1977, should not be dissolved and that plaintiffs are entitled to summary judgment.[1/]

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1. All parties stipulated in open court on July 7, 1977, that none had nor could produce further evidence relevant to any issue concerning the grant or denial of a judgment of permanent injunction.

While section 35160 does give the Board power to enact and carry out programs not in conflict with any law, the Court finds that the Affirmative Action Policy is in conflict with the low bid law, section 39640.

Section 39640 requires that the Board award construction contracts to the "lowest responsible bidder." Its plain purpose is to conserve public funds. The Board may not demand compliance with requirements in conflict with the provisions of section 39640. See City of Inglewood v. Superior Court, 7 Cal. 3d 861, 867, 103 Cal. Rptr. 689, 692-93, 500 P.2d 601, 604-05 (1972).

On May 17, 1977, the Court held that the Board's Affirmative Action Policy transcends the requirements of section 39640. Because the Policy transcends those requirements, it conflicts with that section

and, therefore, is not authorized by section 35160. Section 35160 is not a license to violate the requirements of section 39640.

The choice between spending public funds to try to remedy past racial discrimination or to conserve those funds by awarding construction contracts to the lowest qualified bidder is not one open to the Board. Section 39640 is a legislative determination requiring the Board to choose in favor of conserving public funds.

All of the foregoing as well as the Memorandum and Order entered on May 17, 1977, constitute the Findings of Fact and Conclusions of Law of this Court in granting a permanent injunction against carrying out defendants' Affirmative Action Policy.

IT IS THEREFORE HEREBY ORDERED that:

1. Defendants' and intervenors' motion for reconsideration of the Order of May 17, 1977, is denied;

2. Defendants' and intervenors' motion for summary judgment is denied;

3. Defendants' motion for a stay of enforcement of the preliminary injunction pending appeal is denied;

4. Plaintiffs' motion for partial summary judgment and entry of a permanent injunction is granted;

5. Defendants San Francisco Unified School District and San Francisco Board of Education, each of them, their officers, agents, successors, deputies, servants and employees, and all persons acting by, through or under them or either of them or by or through their order, or in active concert or participation with them, are

hereby permanently restrained and enjoined from requiring, directly or indirectly, that any bidder, in order to be awarded a construction contract as the general contractor, must employ nonwhite owned businesses for at least twenty-five percent of the general contract dollar bid and from otherwise delineating requirements for bidding which are in conflict with the provisions of section 39640 of the California Education Code.

6. This injunction does not preclude defendants from requiring, as a condition of bidding, that bidders agree to comply with all applicable state and federal anti-discrimination laws.

Dated: July 20, 1977

/s/ Stanley A. Weigel
Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA; LATHING AND PLASTERING CONTRACTORS ASSOCIATION, SAN FRANCISCO AND SAN MATEO; PAINTING AND DECORATING CONTRACTORS ASSOCIATION OF SAN FRANCISCO, INC.; W.G. THOMPSON; ARNTZ BROTHERS, INC.; ARNTZ CONTRACTING COMPANY; CAHILL CONSTRUCTION CO.; CHRISTENSEN & FOSTER; DeNARDE CONSTRUCTION; ENGSTRUM & NOURSE; MARTINELLI CONSTRUCTION; PACIFIC COMPANY; WILLIAMS & BURROWS and and FREDERICK MEISWINKEL, INC.,	
Plaintiffs,	No. C-76-2244 SAW
vs.	
SAN FRANCISCO UNIFIED SCHOOL DISTRICT; SAN FRANCISCO BOARD OF EDUCATION; LEE S. DOLSON; SAMUEL MARTINEZ; MRS. JAMES W. ABRAHAMSON; Z. L. GOOSBY; EUGENE HOPP; JOHN A. KIDDER; and THOMAS A. REED,	
Defendants.	

NATIONAL ASSOCIATION OF MINORITY CONTRACTORS, and MINORITY CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, INC.,

Intervenors.

JUDGMENT OF PERMANENT INJUNCTION

In accordance with the Orders on Motions, Findings of Fact, Conclusions of Law and Judgment of Permanent Injunction of July 20, 1977, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

1. Defendants San Francisco Unified School District and San Francisco Board of Education, each of them, their officers, agents, successors, deputies, servants and employees, and all persons acting by, through or under them or either of them or by or through their order, or in active concert or participation with them, are hereby permanently restrained and enjoined

from requiring, directly or indirectly, that any bidder, in order to be awarded a construction contract as the general contractor, must employ nonwhite owned businesses for at least twenty-five percent of the general contract dollar bid and from otherwise delineating requirements for bidding which are in conflict with the provisions of section 39640 of the California Education Code.

2. This injunction does not preclude defendants from requiring, as a condition of bidding, that bidders agree to comply with all applicable state and federal antidiscrimination laws.

Dated: July 20, 1977

/s/ Stanley A. Weigel
Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA; LATHING AND PLASTERING CONTRACTORS ASSOCIATION, SAN FRANCISCO AND SAN MATEO; PAINTING AND DECORATING CONTRACTORS ASSOCIATION OF SAN FRANCISCO, INC.; W.G. THOMPSON; ARNTZ BROTHERS, INC.; ARNTZ CONTRACTING COMPANY; CAHILL CONSTRUCTION CO.; CHRISTENSEN & FOSTER; DeNARDE CONSTRUCTION; ENGSTRUM & NOURSE; MARTINELLI CONSTRUCTION; PACIFIC COMPANY; WILLIAMS & BURROWS and FREDERICK MEISWINKEL, INC.,	
Plaintiffs,	No. C-76-2244 SAW
vs.	
SAN FRANCISCO UNIFIED SCHOOL DISTRICT; SAN FRANCISCO BOARD OF EDUCATION; LEE S. DOLSON; SAMUEL MARTINEZ; MRS. JAMES W. ABRAHAMSON; Z.L. GOOSBY; EUGENE HOPP; JOHN A. KIDDER; and THOMAS A. REED,	
Defendants.	

NATIONAL ASSOCIATION OF MINORITY CONTRACTORS, and MINORITY CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, INC.,

Intervenors.

MEMORANDUM AND ORDER

The plaintiffs fall into two classes: (1) unincorporated associations of general contractors and subcontractors engaged in the building and construction industry in San Francisco and (2) contractors and subcontractors so engaged. None of the plaintiffs is a "nonwhite" owned business. Defendant San Francisco Unified School District (hereafter "District") is a duly organized public body consisting of the public schools in San Francisco. Defendant San Francisco Board of Education (hereafter "Board") is the responsible governing body of the District. Intervenors are two associations of minority contractors, respectively, National Association of

Minority Contractors and Minority Contractors' Association of Northern California, Inc.

On March 17, 1977, this Court issued a preliminary injunction preventing the District and the Board from carrying out what was called an Affirmative Action Policy. That so-called policy required that a bidder, in order to be awarded a construction contract as a general contractor, utilize minority owned businesses for no less than twenty-five percent of the base bid amount, or that the bidder be a minority owned business. The injunction was granted on the sole ground that the evidence had failed to establish that the so-called policy was "the will of the Board established by Board action appropriate to carry out that will."

On March 22, 1977, the Board, voting unanimously, took appropriate action to declare and enforce a new and considerably different Affirmative Action Policy. Based upon the adoption of

the new Policy, the District and Board now move for dissolution of the preliminary injunction. Plaintiffs, of course, oppose.

At the hearing on the motion, all parties stipulated to this effect: In deciding the matter, the Court should pass upon the new Affirmative Action Policy to the same extent as if plaintiffs were moving to enjoin its enforcement.[1/] Accordingly, the Court now considers the new Policy and, in determining whether or not the preliminary injunction

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1/ This stipulation was made by the parties and approved by this Court in the interest of expeditious administration of justice. Absent the stipulation, defendants would have been entitled to dissolution of the injunction on the ground that the present policy is, unquestionably, that laid down by the Board. Then, the plaintiffs would have had to have filed a new motion for a preliminary injunction against enforcement of the new policy, and the defendants would have had to have filed their opposition to the new motion. The stipulation enables the Court to decide, without duplicative paperwork by the parties or undue delay, the question as to whether or not a preliminary injunction should be issued against carrying out the new Policy.

should be dissolved, reaches its decision on the same basis as if the issues were generated by plaintiffs' motion for a preliminary injunction against carrying out the new Policy.

The Board action establishing it may be summarized as follows:[2/]

> The Board found, inter alia, that in 1966 the San Francisco Supervisors adopted an ordinance "requiring affirmative action non-discrimination practices in the award of all city contracts" and that, in 1968, the Board adopted the provisions of that ordinance "prohibiting discrimination in the award of contracts for and on behalf of the San Francisco Unified School District." The

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2/ The entire Policy, contained in five typewritten pages, is appended as Exhibit A. Exhibit A is an exact duplicate, without editing or correction, of the Policy as certified to the Court by the defendant Board and not challenged by plaintiffs as to authenticity. The Court's summary in text is greatly abbreviated.

Board made further findings showing that in 1975 it adopted and implemented a policy requiring a 25% "minority participation in the dollar amount of all contracts" awarded by or on behalf of the Board and that, as a consequence, the percentage of dollar amount awards to minority contractors rose to 33.4% compared with 4.99% during a prior period of over ten years. The Board also found that competent and qualified minority contractors and subcontractors are ready, willing and able to perform school construction contracts.

The Board's findings conclude with a statement to the effect that an effective Affirmative Action Policy requires the Board to act in a manner which will insure the awarding of contracts "to the lowest responsible bidder whose bid is consistent with the affirmative action policy" of the District.

Based upon the foregoing and other findings, the Board's Affirmative Action Policy proceeds to declare its purposes and goals to be these: (A) to assure that competitive nonwhite business participation corresponds with the present availability of nonwhite firms seeking an opportunity to compete for San Francisco School District construction jobs on the same terms as white business firms; (B) to overcome the historic unwillingness of white business firms to participate in joint business ventures with nonwhite business firms; (C) to assure that the effects of past discrimination against nonwhite firms are not perpetuated by the District's construction program; and (D) to guarantee that the largest possible pool of qualified contracting firms will be available for competitive bidding on District construction projects.

The Board resolution then lays down the following requirements:

> General contractors bidding upon school construction projects over $100,000.00 will be required to employ nonwhite owned businesses for individual contract dollar amounts which total at least 25% of the general contract dollar bid. A general contractor who submits a bid that does not meet the 25% requirement will not be considered a responsible bidder and will not be awarded the bid unless he establishes at a hearing that he has taken every possible measure to comply with the 25% requirement.
>
> If the low monetary bidder is found not to have met the 25% nonwhite owned business participation requirement, he shall be informed and notified of the

opportunity for a hearing to rebut any finding of non-compliance and to present evidence on his own behalf.

The Board may award a contract notwithstanding non-compliance "where the Board determines either that the contractor has taken every possible measure to comply, or that it is not practicable in the best interests of the District to require compliance in the specific case."

The Board resolution defines a number of terms including "nonwhite". "[A] nonwhite person is a person whose racial ancestry is one, or a mix, of the following: Black, Asian, Latin America, American Indian, or any native Pacific Island group. A person whose ancestry is a mixture of white and nonwhite will be considered 'nonwhite,' if such ancestry is one-quarter or more nonwhite."

The good faith and good intentions of the Board are not open to question. There is no evidence to suggest that it had any purpose, in laying down the Affirmative Action Policy, other than the laudable one of curbing and correcting racial discrimination which the Board found to have been practiced with respect to nonwhite owned subcontracting businesses. The Board's purpose is manifestly based upon the premise -- requisite to the freedoms protected by our Constitution -- that there be an end to racial discrimination denying equality of economic opportunity.

Plainly, then, the crucial legal question here presented is not one of purpose. It is one of power.

Does the Board have legal authority to proclaim and carry out the Affirmative Action Policy?

As the law now stands, there is little doubt that the State of California itself could require compliance with an Affirmative Action Policy of the kind here before the Court. The State could also authorize school boards to declare and effectuate such policies. Many decisions confirm the power of state legislatures (and of other governmental bodies authorized to establish public policy) to mandate preferences for racial minorities, when the mandate is based upon proper findings of past discrimination against those minorities. For example, the State of Massachusetts can require a contractor for publicly funded construction work at Boston State College to

> ". . . maintain on his project, which is located in an area in which there are high concentrations of minority group persons, a not less than twenty percent ratio of minority employee man hours to

total employee man hours in each job category. . . ." Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9, 11 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974).

The underlying rationale of this and other like decisions is well stated in the First Circuit's opinion written by Chief Judge Coffin. Agreeing with Justice Harlan's famous observation that the United States Constitution is colorblind, Judge Coffin remarked:

> It is by now well understood, however, that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new

opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities. 490 F.2d at 16.[3/]

3/ Other cases in accord with Altshuler include: Franks v. Bowman Transp. Co., 424 U.S 747 (1976), permitting seniority relief for minorities; Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972), upholding the Ogilvie Plan for the recruitment, placement and training of minorities in the highway construction industry of southern Illinois; Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159, 175 (3d Cir.), cert. denied, 404 U.S. 854 (1971), upholding the Philadelphia Plan which required bidders on construction projects to have an affirmative action policy so as to advance the Plan's goals for minority hiring; Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), cert. denied, 402 U.S. 944 (1971), holding that the promotion by the Newark Board of Education of black teachers over white teachers, in disregard of a promotional list, was constitutional; Germann v. Kipp, No. 76 CV 36-W-4 (W.D. Mo., April 7, 1977) (excerpted in 45 U.S.L.W. 2486), upholding the promotion of minorities ahead of whites in the Kansas City, Mo., Fire Department; Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970), upholding the Newark Plan which

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

To say that the legislature of the State of California (or the people by initiative) could lawfully require conformity to the Affirmative Action Policy or could empower subordinate bodies, such as boards of education, to do so, is not to say that the San Francisco Board of Education has that power. As will be seen, the Board's powers are limited, under the state constitution and statutory enactments, to those closely related to public education and school administration. They do not enable the Board to require building contractors and subcontractors to conform to a social policy declared by the

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

set goals for the utilization of minority journeymen on construction projects; Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), cert. denied, 396 U.S. 1004 (1970), holding that Cuyahoga Community College District properly rejected the lowest financial bid for a construction project where the bidder failed to assure the District that he would comply with antidiscrimination laws.

Board, however enlightened and desirable that policy may be.

The powers of the Board derive entirely from the state constitution and a state statute, the California Education Code. They are limited to those matters having a reasonably direct relationship to the operation of schools -- matters such as administration, staffing, curricula, text books, school building construction and maintenance, rules for admission, disciplinary procedures, etc. See, e.g., Cal. Constit. Art. 9, § 14; Calif. Educ. Code §§ 1051, 15351.

Nevertheless, the Board claims that the state legislature has given it authority to lay down and enforce the Affirmative Action Policy. It is to be found, the Board contends, in the provisions of California Education Code § 15951 reading as follows:

> The governing board of any school district shall let any contracts involving

> an expenditure of more than five thousand dollars ($5,000) for work to be done or more than eight thousand dollars ($8,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise. (Emphasis added.)

In particular, the Board relies upon the word "responsible".

Plaintiffs urge that the quoted section does not sanction the Affirmative Action Policy. The Court agrees.

The manifest purpose of section 15951 -- clear from its plain language -- is to protect the public against corrupt or wasteful expenditure of school funds. Defendants' reliance upon the word "responsible" as authorizing the Board's

Affirmative Action Policy calls for transforming section 15951 from one narrowly focusing upon honesty and economy into an enactment of public policy by which the California legislature undertook to redress, or permit school boards to redress, past racial discrimination by contractors dealing with school boards. No such broad intendment can reasonably be read into the section.

Defendants, arguing to the contrary, rely upon an opinion of the California Attorney General issued in 1963 and upon a 1969 decision of the Supreme Court of Ohio rendered by a divided court.

Upon careful analysis, it will be seen that the Attorney General's opinion (42 Ops. Att'y Gen. 169 (1963)) does not support defendants' contention. The question presented to the Attorney General was whether the Berkeley Unified School District and its Board of Education

could include, in school construction contracts, clauses prohibiting builders from engaging in racial and religious discrimination in their employment practices. The Attorney General found that such clauses were "consistent with and in aid of existing statutes". The opinion then proceeded to state that "conformity to the laws prohibiting employment discrimination on public works would appear to be a criterion well within the requirements of being a 'responsible bidder' especially in view of the fact that such laws represent an urgent policy of this state."

The Ohio case, upon which defendants place great reliance, is Weiner v. Cuyahoga Community College Dist., supra, note 3. It is not clear from either the majority nor the minority opinion as to precisely what was required by the school board policy in that case. But there again, as is true of the California Attorney General's opinion, the question involved related to the

power of the district (a college district in that case) to require a bidder to conform to law. The majority opinion stated:

> We conclude that the capacity to assure a performance which complies with antidiscrimination laws is reasonably a part of the standard of a best or responsible bidder on a contract involving the expenditure of public funds. 249 N.E.2d at 910 (emphasis added).

It is one thing to say that a bidder is not responsible if he is unwilling to comply with the law. It is quite another to say that the Board can declare a social policy and then categorize a bidder as not responsible within the terms of section 15951 for failing or refusing to comply when that policy transcends the authorized power of the Board. See Broidrick v. Lindsay, 39 N.Y.2d 641, 350 N.E.2d 595 (1976).

The most recent, authoritative interpretation of the term "lowest responsible bidder" is to be found in a decision of the California Supreme Court, City of Inglewood v. Superior Court, 7 Cal. 3d 861, 103 Cal. Rptr. 689, 500 P.2d 601 (1972). After pointing out that trustworthiness, quality, fitness and capacity are included in the term "responsible bidder", the California Supreme Court goes on to say: "Thus, a contract must be awarded to the lowest bidder unless it is found that he is not responsible, i.e., not qualified to do the particular work under consideration." 7 Cal. 3d at 867. There is not the slightest hint in Inglewood nor any other California case that the term "lowest responsible bidder" is sufficiently broad to justify the construction that a bidder is not responsible if he does not comply with a

social policy adopted by the Board without constitutional or statutory authorization.[4/]

To repeat, the Affirmative Action Policy of the San Francisco Board of Education serves desirable purposes, but it goes beyond requiring compliance with duly enacted laws. In other words, it is a Board policy which lacks legislative authorization and therefore may not be legally imposed. Defendants must turn to the California legislature or to the California electorate (through the initiative process) for authorization of that policy.[5/]

4/ The term "lowest responsible bidder" has been unchanged since the original enactment of what has become section 15951. 1919 Cal. Stats. c.552, p. 741. No amendment has affected the meaning of the quoted phrase as used from the beginning.

5/ In reaching its decision, the Court has not disregarded the difficult problem faced by the Board when it adopted the Affirmative Action Policy. It had found that nonwhite subcontractors

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

A Ninth Circuit decision, William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc., 526 F.2d 86, 88 (1975), binding upon this Court, lays down the standards governing the issuance of preliminary injunctions. It rules that a plaintiff is entitled to a preliminary injunction upon showing (1) probable success on the merits and (2) the possibility of irreparable injury. In this case, plaintiffs' probable

---

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

had been discriminated against by general contractors for some ten years. It had futher found that a remedy thereafter invoked for a year had helped correct the invidious discrimination. On these facts, failure to remedy past discrimination could open the Board to charges that it was tolerating, if not itself participating in, unlawful discrimination. See Ethridge v. Rhodes, 268 F. Supp. 83, 88 (S.D. Ohio 1967). But the logic underlying any such charge is more inviting than compelling. It begs the quesiton of limitation on the Board's power. If the Board lacks the power to require others to correct past racial discrimination, it cannot gain that power simply because it has seen others engage in such discrimination nor because the Board was able to correct it by exceeding the Board's authority.

success on the merits is augured because of the Board's lack of authority to lay down the Affirmative Action Policy. And, as to the possibility of irreparable injury, the Board's Affirmative Action Policy must mean in some cases, at least, that white owned subcontractors will be rejected or by-passed in favor or nonwhite owned subcontractors solely because the former are white. It necessarily follows that white owned subcontractors are faced with "the possibility of irreparable injury".

Nothing in this opinion is to be construed as in anywise precluding defendants from requiring, as a condition of bidding, that the bidder must agree to comply with all applicable state and federal antidiscrimination laws, including the Constitution of the United States and that of the State of California.

For all of the foregoing reasons, defendants' motion to dissolve the preliminary injunction is hereby denied.

Dated: May 17, 1977.

/s/ Stanley A. Weigel
Judge

FINDINGS AND AFFIRMATIVE ACTION POLICY RELATING TO PARTICIPATION OF MINORITY CONTRACTORS IN SCHOOL CONSTRUCTION PROGRAM AND INTERIM REGULATIONS - 1977 (P 3665.1)

This Board of Education of the San Francisco Unified School District finds:

1. That on July 24, 1964, the Board of Supervisors of the City and County of San Francisco adopted Ordinance No. 209-64 based upon findings duly made, among other things, that:

> The population of this city and county is composed of people of various racial, religious and ethnic groups. In this city and county, the practice of discrimination on the grounds of race, religion, color, ancestry, or place of birth and the exploitation of prejudice related thereto adversely affects members of minority groups.
>
> Such discriminatory practices are inimical to the public welfare and good order in that they: (1) impede social and economic progress for the entire citizenry by preventing members of minority groups from achieving full development of their individual potentialities and from contributing fully to the cultural and business life of the community; (2) constantly frustrate, degrade and embitter members of minority groups, thereby diminishing their initiative and interest in the community; and (3) tend to create intergroup hostilities and antisocial behavior.

EXHIBIT "A"

Subject: Findings and Affirmative Action Policy Relating to Participation of Minority Contractors in School Construction Program and Interim Regulations - 1977 (P 3665.1)

The products of discrimination accumulate continuously; with the result that the social, economic and educational gaps between those suffering discrimination and the majority of the community constantly widen. As a result, mere prohibition of future and present discrimination, while essential, will not reduce the inequalities and disadvantages which a history of discrimination has produced. Accordingly, affirmative remedial action must be initiated, encouraged and coordinated.

2. That on October 10, 1966, the Board of Supervisors of the City and County of San Francisco adopted Ordinance No. 261-66, adding Chapter 12B to the San Francisco Administrative Code and requiring affirmative action nondiscrimination practices in the award of all city contracts; and that on January 16, 1968 by Resolution No. 81-16A1, this Board adopted the provisions of said Chapter 12B prohibiting discrimination in the award of contracts for and on behalf of the San Francisco Unified School District.

3. That on January 20, 1970, this Board adopted Resolution No. 01-20A1 authorizing formation of a committee to formulate procedures for an affirmative action program in the awarding of school construction contracts and to secure increased participation of minority contractors in the bidding and awarding of such contracts, and did, on May 19, 1970, by Resolution No.

Subject: Findings and Affirmative Action Policy Relating to Participation of Minority Contractors in School Construction Program and Interim Regulations - 1977 (P 3665.1)

05-19A1 adopt an affirmative action policy governing the award of school construction contracts and assigning the Superintendent of Schools the responsibility for carrying out said policy.

4. That on December 15, 16 and 17, 1970, the Office of Contract Compliance, Equal Employment Opportunity, United States Department of Labor, held hearings in the City and County of San Francisco for the purpose of determining what action should be taken to ensure equal employment opportunity in the construction industry in San Francisco, California, and, further, to determine the availability and utilization of minority contractors on Federally-involved contracts. It was thereupon found that minority workers have been prevented from fully participating in the construction trades and that utilization of minority subcontractors by contractors could significantly expand the participation of minority craftsmen on projects of federal construction contractors. The San Francisco Plan (41 C.F.R. 60-6), was adopted by the United States Department of Labor setting minimum goals for participation of minorities in federal contracts.

This Board further finds:

1. That during the period commencing January 1964 to and including June 30, 1975, contracts for school construction projects were let and awarded for and on behalf of the School

District in the total dollar amount of $87,241,573; that minority contractors and subcontractors participated in the performance of said contracts in the total dollar amount of $2,532,205, representing 4.99 per cent minority contractor participation in the total dollar amount of said contracts; that on or about July 1, 1975, the School District administratively, and pursuant to authority conferred upon the Superintendent aforesaid, adopted and implemented a policy of requiring a minimum of 25 per cent minority participation in the dollar amount of all contracts let or awarded by or on behalf of the School District; that commencing July 1, 1975, to and including October 30, 1976, school construction contracts containing said affirmative action requirement were let and awarded in the total dollar amount of $20,620,788, of which minority contractors participated in the sum of $6,892,264, representing 33.4 per cent of the total dollar amount of said contracts.

2. That there are now, and have been, in the City and County of San Francisco and immediate environs, during all of the the times herein mentioned, competent and qualified minority contractors and subcontractors who are now, and have been, ready, willing and able to perform school construction contracts and to participate more fully in the performance thereof; and that the failure of minority contractors and subcontractors to participate more fully in the performance of school construction contracts has resulted

primarily from exclusion from participation therein and discrimination based upon race, religion, color, sex or national origin contrary to federal, state and local laws.

3. That the implementation and administration of an affirmative action policy in the award of school construction contracts which will ensure minimum minority participation in the performance of school construction contracts requires that this Board adopt a policy which shall ensure contracts shall be awarded to the lowest responsible bidder whose bid is consistent with the affirmative action policy of the San Francisco Unified School District herein set forth.

AFFIRMATIVE ACTION POLICY

BUSINESS PARTICIPATION POLICY OF NONWHITE OWNED BUSINESSES

I. POLICY AND PURPOSE

The policy of the Board in enacting this Affirmative Action Program, and in setting forth goals therein, is as follows:

A. To assure that competitive nonwhite business participation corresponds with the present availability of nonwhite firms that are seeking a fair and nondiscriminatory

opportunity to compete for San Francisco School District construction jobs on the same terms as white business firms;

B. To overcome the historic unwillingness of white business firms to participate in joint business ventures with nonwhite business firms, which joint participation is an integral part of the construction industry;

C. To assure the presently evidenced effects of past discrimination against nonwhite firms within the construction industry is not perpetuated by the construction program of the San Francisco Unified School District;

D. To guarantee the largest possible pool of qualified contracting firms will be available for the competitive bidding upon, and accomplishment of, San Francisco Unified School District Construction Projects.

II. AFFIRMATIVE ACTION GOALS

A. In order to comply with the requirement for being a "responsible bidder" under Education Code 15951, general contractors bidding upon school construction projects over $100,000 will be required, under this Program, to employ nonwhite owned businesses for individual contract dollar amounts which total at least 25% of the general contract dollar bid.

A general contractor who submits a bid under this program that does not meet this minimum 25% dollar participation goal will be considered not responsible under Education

Code § 15951, and will not be awarded the bid unless the bidder establishes at a hearing that he has taken every possible measure to comply with the 25% dollar participation goal of this program.

B. 1. Determination of Responsible Bidder. In the event that the dollar participation goal of paragraph A is not met, the District may consider the bidder as not responsible and not award the contract to him unless the bidder establishes at a public hearing before the Board of Education that he has taken every possible measure to comply with the program.

2. Opportunity for Hearing. If the low monetary bidder is found not to have met the 25% nonwhite owned business participation requirement, he shall be informed of such non-compliance and notified of the opportunit to request, within five days after receipt of such notification, a hearing before the Board of Education to rebut any finding of non-compliance and to present evidence on his own behalf.

3. Discretion of Board. The Board of Education may award a contract notwithstandin non-compliance with its affirmative action goal where the Board determines either that the contractor has taken every possible measure to comply, or that it is not practicable in the best interests of the District to require compliance in the specific case.

C. In furtherance of this defined policy, "ownership" is defined as follows:

1. The ownership of a thing is the right of one or more persons to possess and use the thing owned to the exclusion of others. The elements of control in the use of a business and the liability for one's actions in the use of a business are essential to the definition of ownership pursuant to this Program which seeks to eliminate discriminatory practices in the construction industry.

2. Excluding sole proprietorships and corporately owned businesses, nonwhite ownership of a business will be calculated as a percentage in direct proportion to the ownership interest the nonwhite person has in the business. This ownership interest will be determined according to the general legal definitions of such ownership.

III. Interim Regulations 1977 covering specific types of business formations are hereby passed effective to and including June 30, 1977, pending further study and recommendation by the Superintendent.

INTERIM REGULATIONS 1977

A. RECOGNIZED BUSINESS OWNERSHIP

1. Partnerships: Partners are owners of the business and "all partners have equal rights in the management and conduct of the partnership's business." (Corp. Code § 15018(e)).

2. Joint Ventures: The resemblance between a partnership and a joint venture is so close that the rights as between adventure are governed practically by the same rules that govern partners. However, each joint venture agreement will be examined to assure that the intent and purpose of this Program is not subverted by the joint venture agreement.

3. Limited Partnership: The purpose of this Program is to impose a legally enforceable obligation upon the person exercising ownership control of a business, and since limited partners do not take part in control of the business, and are not bound by the obligations of the partnership (Corp. Code § 15501), limited partners are not considered "owners" of the business for purposes of this Program.

4. Corporation: A corporation is a legal person or entity recognized as having an existence separate from that of its shareholders. The corporation, itself, is the "business owner," and for purposes of this Program, a corporate business will be considered to be a nonwhite business if 51% or more shares of its voting stock are held by nonwhite persons.

B. "NONWHITE" Defined

In general, the term "nonwhite" shall be defined in order to carry out the overall purpose of this program which is to guarantee equal business opportunity for those persons historically stigmatized and discriminated against, because of ancestry, by the social

policies and racial views of the white majority in this country as a whole.

For purposes of this Program, a nonwhite person is a person whose racial ancestry is one, or a mix, of the following: Black, Asian, Latin American, American Indian, or any native Pacific island group. A person whose ancestry is a mixture of white and nonwhite will be considered "nonwhite," if such ancestry is one-quarter or more nonwhite.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA; LATHING AND PLASTERING CONTRACTORS ASSOCIATION, SAN FRANCISCO AND SAN MATEO; PAINTING AND DECORATING CONTRACTORS ASSOCIATION OF SAN FRANCISCO, INC.; W.G. THOMPSON; ARNTZ BROTHERS, INC.; ARNTZ CONTRACTING COMPANY; CAHILL CONSTRUCTION CO.; CHRISTENSEN & FOSTER; DeNARDE CONSTRUCTION; ENGSTRUM & NOURSE; MARTINELLI CONSTRUCTION; PACIFIC COMPANY; WILLIAMS & BURROWS and FREDERICK MEISWINKEL, INC.,	
Plaintiffs,	No. C-76-2244 SAW
vs.	
SAN FRANCISCO UNIFIED SCHOOL DISTRICT; SAN FRANCISCO BOARD OF EDUCATION; LEE S. DOLSON; SAMUEL MARTINEZ; MRS. JAMES W. ABRAHAMSON; Z.L. GOOSBY; EUGENE HOPP; JOHN A. KIDDER; and THOMAS A. REED,	
Defendants.	

NATIONAL ASSOCIATION OF MINORITY CONTRACTORS, and MINORITY CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, INC.,

Intervenors.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

The named plaintiffs fall into two classes: (1) unincorporated associations of general contractors and subcontractors engaged in the building and construction industry in San Francisco and (2) contractors and subcontractors so engaged. None of the plaintiffs is a "minority-owned" contractor or subcontractor within the meaning of the quoted term as hereinafter elaborated.

The defendant San Francisco Unified School District (hereafter "District") is a duly organized public body consisting of the public schools in San Francisco. The defendant San Francisco

Board of Education (hereafter "Board") is the responsible governing board of the District. The individually named defendants are members of the Board, defendant Dolson being named as President and defendant Martinez as Vice President.

The Complaint charges that defendants require conformity with the following policy as a condition of awarding construction contracts.

> Affirmative Action Policy in Award of Contracts: The District shall award construction contracts to the lowest responsible Bidder as required by Education Code Section 15951. In order to meet the criterion of being a responsible bidder, the general contractor must utilize minority-owned businesses for no less than 25% of the Base Bid amount, or the general contractor himself must be a minority-owned business. (Emphasis not added.)

As used in the above quoted policy statement:

> Minority refers to the following racial or ethnic groups: American Indian, Black, Chinese, Filipino, Japanese, Spanish American and other non-white racial and ethnic groups.1/

1/ Answers filed by defendants January 25, 1977, in response to written questions propounded by the Court, Exhibit 4.16b, at GC-19 n.3.

The term "non-white racial and ethnic groups" includes, in addition to the groups specified above, all Hawaiians, Aleuts, Eskimos and Asians other than those listed above.2/

Defendants rely on the following section of the California Education Code as justifying their Affirmative Action Policy.

§ 15951. Letting of contracts to lowest bidder

> The governing board of any school district shall let any contracts involving an expenditure of more than * * * five thousand dollars (* * * $5,000) for work to be done or more than eight thousand dollars ($8,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise.

2/ Id., Exhibit 4.5, at vii. At the hearing on the motion for Preliminary Injunction, February 1, 1977, counsel for the defendants affirmed and represented to the Court, without qualification, that the definition of minority set out in the text (including the definition of "non-white racial and ethnic groups") was that used in connection with the stated Affirmative Action Policy.

The position of the defendants is that the Code section empowers them to lay down the 25% requirement as a criterion of the term "responsible bidder".

The plaintiffs contend that the action of the defendants violates, as to plaintiffs, the provisions of two federal statutes, namely, 42 U.S.C. § 1981 which reads

> § 1981. Equal rights under the law
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

and 42 U.S.C. § 1983 which reads

> § 1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any

> citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The essence of plaintiffs' argument is that the defendants' actions constitute an impermissible discrimination against contractors and subcontractors who are not minority-owned.

The Court has concluded that it need not reach the question as to whether the defendants may lawfully adopt and enforce the Affirmative Action Policy. The reason is that there is not sufficient evidence to show that the claimed policy is actually that of the Board.

Nowhere is there to be found a single, clear-cut resolution or other positive action by the Board adopting the policy. Nor has the Board made any finding of past discrimination against minorities. Counsel for defendants have frankly admitted that the asserted policy is to be

derived only from two sources, namely, (1) scattered, unrelated records and (2) ratification by the Board of a number of contracts recommended to the Board by the staff which had included the Affirmative Action Policy in the calls for bids. While the Board did award or ratify contracts which required compliance with the Affirmative Action Policy, it is far from clear that this was a delineation of Board policy applicable to all contracts. The Board alone, not the staff, has the power to enact policy. And a policy as controversial as that before the Court is not to be assumed or presumed.[3/]

If the quoted Affirmative Action Policy is, indeed, the official policy of the Board, it would be a very simple matter for the Board plainly to spell it out and adopt it by proper

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3/ California Government Code § 54950 requires that public board "actions be taken openly and that their deliberations be conducted openly."

procedure in conformity with the relevant requirements for Board action.

The question of the power of the Board to declare and enforce such an Affirmative Action Policy cannot be adjudicated on the facts before this Court. To repeat, the evidence fails to establish that the policy is the will of the Board established by Board action appropriate to carry out that will.

It should be emphasized that the Court does not hereby decide whether or not the Board has the lawful power to declare and effectuate the quoted or any other affirmative action policy. The Court's present holding is limited to the decision that the evidence now before it is inadequate to establish that the Board has undertaken to declare and effectuate the challenged policy.

In the light of all the foregoing, which constitutes the Court's Findings of Fact and

Conclusions of Law on the motion for Preliminary Injunction, the Court decides that there is not sufficient evidence to establish that the Affirmative Action Policy actually has been adopted and promulgated by the Board and that, for that reason alone, efforts now to impose it upon plaintiffs are not supportable.

Dated: March 17, 1977.

/s/ Stanley A. Weigel
Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA; LATHING AND PLASTERING CONTRACTORS ASSOCIATION, SAN FRANCISCO AND SAN MATEO; PAINTING AND DECORATING CONTRACTORS ASSOCIATION OF SAN FRANCISCO, INC.; W.G. THOMPSON; ARNTZ BROTHERS, INC.; ARNTZ CONTRACTING COMPANY; CAHILL CONSTRUCTION CO.; CHRISTENSEN & FOSTER; DeNARDE CONSTRUCTION; ENGSTRUM & NOURSE; MARTINELLI CONSTRUCTION; PACIFIC COMPANY; WILLIAMS & BURROWS and FREDERICK MEISWINKEL, INC.,	
Plaintiffs,	No. C-76-2244 SAW
vs.	
SAN FRANCISCO UNIFIED SCHOOL DISTRICT; SAN FRANCISCO BOARD OF EDUCATION; LEE S. DOLSON; SAMUEL MARTINEZ; MRS. JAMES W. ABRAHAMSON; Z.L. GOOSBY; EUGENE HOPP; JOHN A. KIDDER; and THOMAS A. REED,	
Defendants.	

NATIONAL ASSOCIATION OF MINORITY CONTRACTORS, and MINORITY CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, INC.,

Intervenors.

PRELIMINARY INJUNCTION

This cause came on to be heard on Plaintiffs' Motion for a Preliminary Injunction, and the Court having considered the Complaint, the Affidavits submitted in support of said motion and having heard counsel for Plaintiffs and for Defendants San Francisco Unified School District and San Francisco Board of Education and it appearing to the Court after due deliberation that, for reasons stated in the Court's Findings of Fact, Conclusions of Law and Order Granting Motion for Preliminary Injunction, this day filed, Plaintiffs are entitled to this preliminary injunction.

Now, therefore,

IT IS ORDERED that Defendants San Francisco Unified School District and San Francisco Board of Education, each of them, their officers, agents, successors, deputies, servants and employees, and all persons acting by, through or under them or either of them or by or through their order, or those in active concert or participation with them who receive notice of this Order, be, and they are hereby, restrained and enjoined, until the further order of this Court, from requiring that a bidder, in order to be awarded a construction contract as the general contractor, must utilize minority-owned businesses for no less than twenty-five percent of the Base Bid amount, or that the bidder must be a minority-owned business.

This preliminary injunction is on condition that a cash or corporate surety bond be filed by Plaintiffs herein in the sum of 100,000.00

dollars conditioned for payment of such costs and damages as may be incurred or suffered by any party who was found to have been wrongfully restrained or enjoined, said bond to be approved by this Court.

Dated: March 17, 1977.

/s/ Stanley A. Weigel
Judge

APPENDIX H

United States Constitution, Amendment Fourteen § 1.

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

42 U.S.C. § 1981.

All persons within the jursidiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is

enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

California Education Code § 35160.

On and after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established.

California Education Code § 39640.

The governing board of any school district shall let any contracts involving an expenditure of more than eight thousand dollars ($8,000) for work to be done or more than twelve thousand dollars ($12,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids . . .

Supreme Court, U. S.
FILED
NOV 19 1980
MICHAEL RODAK, JR., CLERK

No. 80-295
IN THE

Supreme Court of the United States

October Term, 1980

NATIONAL ASSOCIATION OF MINORITY CONTRACTORS and MINORITY CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, INC.,

Petitioners,

vs.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, *et al.*,

Respondents.

Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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No. 80-295
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vs.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, *et al.*,

Respondents.

Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

I.

Counterstatement of the Questions Presented.

Respondents do not accept the formulation of issues presented by Petitioners and suggest the following counterstatement:

1. May the governing board of a local school district, acting without specific statutory authorization or the mandate of the State legislature, hold hearings and make administrative findings regarding the existence of prior discrimination against racial minorities and enact a minority business enterprise "set-aside" program to apply to state

and federally financed construction projects built within the school district?

2. May a local school board enact special bidding requirements governing the award of contracts for construction of public schools beyond those authorized and required by State law?

3. May a local school board, acting without authorization from the State, enact a minority business enterprise "set-aside" program for use on construction projects in its own district, when such program is in apparent conflict with the State law requirement that public works contracts be awarded to the lowest responsible bidder?

II.

Statement of the Case.

The San Francisco Unified School District ("School District") is a political subdivision of the State of California and is governed by a local Board of Education ("Board"). The powers and duties of the School District and the Board are set forth in California Education Code Section 35000 *et seq*. Specific statutory provisions authorize the Board to acquire sites for the construction of school facilities (Education Code §35270), acquire and pay for educational and athletic equipment (Education Code §35272) and maintain and operate schools and classes (Education Code §35290). Other statutory provisions explicitly authorize the School District and its Board to undertake other types of clearly described activities.

No provisions of the California Education Code explicitly permit a local school district or its board to enact minority business enterprise "set-aside" programs in the letting of school construction contracts.

California Education Code Section 39640 (''the lowest responsible bidder law'') governs the letting of school construction contracts:

> ''The governing board of any school district shall let any contracts involving an expenditure of more than eight thousand dollars ($8,000.00) for work to be done or more than twelve thousand dollars ($12,000.00) for materials or supplies to be furnished, sold or leased to the district, to the *lowest responsible bidder* who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise.'' [Emphasis supplied.]

In March, 1977, the Board adopted an Affirmative Action Policy, which required that general contractors on school construction projects over one hundred thousand dollars ''employ non-white owned businesses for individual contract dollar amounts which total at least twenty-five percent of the general contract dollar bid.'' The Board determined that general contractors which submitted bids which did not meet the twenty-five percent minority business participation goal would not be considered ''responsible'' bidders within the meaning of the ''lowest responsible bidder'' statute.

In May, 1977, the U.S. District Court for the Northern District of California issued an order preliminarily enjoining the implementation of the Affirmative Action Policy, finding that the Board lacked the legal authority to promulgate such a policy. The Court found that the Affirmative Action Policy adopted by the Board conflicted with the lowest responsible bidder statute in the California Education Code. While noting that ''there is little doubt that the State of California itself could require compliance with an affirmative action policy of the kind here before the Court,'' and that ''the State could also authorize school boards to

declare and effectuate such policies," the Court found no statute in the California Education Code which permitted the Board to enact its own Affirmative Action Policy. The Court concluded that the Affirmative Action Policy "is a Board policy which lacks legislative authorization and therefore may not be legally imposed." (Petition, Appendix E.)

Subsequently, a motion for reconsideration was presented to the U.S. District Court. The moving parties contended that authority for enactment of the Board's Affirmative Action Policy lay in California Education Code Section 35160, which provides:

> "On and after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner *which is not in conflict with, or inconsistent with*, or preempted by, *any law* and which is not in conflict with the purposes for which school districts are established." [Emphasis supplied.]

The U.S. District Court rejected the argument that this statute furnished a basis for the adoption of the Affirmative Action Policy, finding that the policy conflicted with the lowest responsible bidder law (California Education Code §39640) and holding that the Board was without authority to require compliance with requirements in conflict with the provisions of that statute. (Petition, Appendix C.)

In reaching its decision, the U.S. District Court relied heavily on the decision of the California Supreme Court in *City of Inglewood v. Superior Court*, 7 Cal. 3d 861 (1972) in which the Court held that "a contract [for a public works project] must be awarded to the lowest bidder unless it is found that he is not responsible, *i.e.*, not *qualified* to do the particular work under consideration." 7 Cal. 3d at 867 [Emphasis supplied].

The District Court found that "there is not the slightest hint in *Inglewood* or any other California case that the term 'lowest responsible bidder' is sufficiently broad to justify the construction that a bidder is not responsible if he does not comply with a social policy adopted by the Board without constitutional or statutory authorization." (Petition, Appendix E, pp. 20-21.)

The U.S. District Court's decision was appealed to the Ninth Circuit Court of Appeals, which affirmed. *Associated General Contractors of California v. San Francisco Unified School District*, 616 F. 2d 1381 (9th Cir. 1980).

Although the Ninth Circuit Court of Appeals engaged in a lengthy and extensive discussion of the requirements of affirmative action programs, the critical determination it reached was that the U.S. District Court had correctly found the "lowest responsible bidder" statute to preclude the enactment of the Board's Affirmative Action Policy.

III.

Reasons the Writ Should Not Be Granted.

The Petitioners assert three reasons for granting a Writ of Certiorari in the instant proceeding. Respondents reply to each of those reasons in the order in which they are presented.

A. This Case Does Not Raise the Question of Whether a State May Constitutionally Prohibit All Race-Conscious Remedies; Rather, the Issue Is What Body Is Competent to Determine Whether a Race-Conscious Remedy Shall Be Enacted.

Petitioners argue that if the Education Code's lowest responsible bidder law prohibits the San Francisco School Board from adopting a race-conscious remedial program to redress prior discrimination, the law is unconstitutional.

With all deference to Petitioners, this contention ignores the fundamental issue at stake in this case. The question here is not *whether* it is appropriate to adopt a race-conscious remedy for alleged prior discrimination, but *who* would have the competence and authority to determine whether such a remedy is necessary or appropriate, and take the steps to adopt it.

As the Petitioners candidly note, the U.S. District Court's decision in this case focuses "not [on] whether the Board's purpose in enacting the program was a proper one, but instead whether the Board 'had the legal authority' to do so." (Petition, page 7.) This is the fundamental and dispositive issue in this case.

Under California law, a school district is simply a statutorily-created state-controlled entity, which exercises only those powers granted to it by statute:

> "Furthermore, a board of school trustees, being neither a natural nor an artificial person, does not enjoy the same natural privileges and constitutional rights as do such persons. Such a board is merely an administrative agency created by statute and invested only with the powers expressly conferred, subject to the limitations thereto attached by the legislature." *Grigsby v. King*, 202 Cal. 299, 304 (1927). See also *Hall v. City of Taft*, 47 Cal. 2d 177 (1956); *Ferdig v. State Personnel Board*, 71 Cal. 2d 96 (1969); *Burton v. Board of Education*, 71 Cal. App. 3d 52, 57 (1977).

The District Court found that "The crucial legal question here presented is not one of purpose. It is one of power . . . There is little doubt that the State of California itself could require compliance with an affirmative action policy of the kind here before the Court. The State could also authorize school boards to declare and effectuate such policies." (Petition, Appendix E, pp. 10-11.)

However, the District Court found an absence of any evidence that the California legislature had delegated such authority to the San Francisco School Board:

> "The powers of the Board derive entirely from the State Constitution and a state statute, the California Education Code. They are limited to those matters having a reasonably direct relationship to the operation of schools — matters such as administration, staffing, curricula, textbooks, school building construction and maintenance, rules for admission, disciplinary procedures, etc." (Appendix E, p. 15.)

The U.S. District Court concluded that the Board's Affirmative Action Policy was "a Board policy which lacks legislative authorization and therefore may not be legally imposed. Defendants must turn to the California legislature or the California electorate (through the initiative process) for authorization of that policy." (Appendix E, p. 21.)

Petitioner's reliance on *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971), is misplaced. In *Swann*, the issue was whether a *state* could enact a statute which would actively hinder vindication of federal constitutional rights of school pupils. In this case, both the District Court and the Circuit Court of Appeals agreed that the manifest purpose of the lowest responsible bidder law is to protect the public fisc, a non-discriminatory purpose. *Swann* does not deal with the question of whether a local school board, which possesses only rights delegated to it by the state, may enact its own special minority business enterprise program which conflicts with state bidding procedures.

Respondents do not contend that the State of California is without the authority to enact a legal minority business enterprise program. The state, however, has passed no such legislation. The issue here focuses on the authority of a local school board to enact a program which flies in the face of

state legislation specifically directing school boards to award school construction contracts to the "lowest possible bidder." If the lowest responsible bidder law operates to perpetuate past discrimination, that is scarcely a matter which each individual school board in the state of California should address separately, in the absence of statutory authorization. If ameliorative provisions are necessary, the problem will have to be addressed by the State legislature itself.

The Petitioners attempt to finesse the issue of the Board's authority to enact an affirmative action policy by pointing to California Education Code Section 35160, a general enabling statute, which provides:

> "On and after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established."

The District Court found that this statute did not vest the School Board with authority to enact a minority business enterprise program which would apparently conflict with the Education Code's lowest responsible bidder law (§39640). The District Court found, and the Circuit Court of Appeals agreed, that the term "lowest responsible bidder" as used in California Education Code Section 39640 mandated that school construction projects be awarded to "the lowest bidder whose offer best responds, in quality, fitness, and capacity to the particular requirements of the proposed work". *Cf. West v. City of Oakland*, 30 Cal. App. 556 at 560 (1916). Because the Affirmative Action Policy of the San Francisco School Board would permit the award of school

construction contracts to contractors other than the "lowest responsible bidder," both Courts correctly held that the policy could not stand.

B. Petitioners' Argument That the School Board Has a Constitutional Duty to Engage in Affirmative Action to Remedy Past Discrimination Begs the Question of the Board's Authority to Investigate and Redress Discriminatory Conduct.

Petitioners' second argument is that once the Board has identified the existence of prior discrimination, it is under a constitutional duty to engage in affirmative action to remedy the effects of that discrimination. This argument simply begs the question. The fundamental issue never addressed by Petitioners is whether the School Board possesses the authority in the first place to hold hearings to "determine" that prior discrimination has occurred. The holding of such hearings and the prescription of remedies for whatever evils they may uncover is not one of the limited powers granted to local school boards by the State of California.

All of the decisions of this Court which have considered the obligation of non-judicial governmental entities to establish remedies for past discrimination have emphasized the requirement that the entity making the finding of past discrimination and prescribing the remedy be *competent* to do so. The facts of this case are parallel to those in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

In *Bakke*, Mr. Justice Powell explicitly noted that the Regents of the University of California were not an appropriate body to make findings and prescribe remedies regarding racial discrimination:

> "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations . . .

> Petitioner does not purport to have made, *and is in no position to make*, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality." 438 U.S. at 307-09. [Emphasis supplied; citations omitted.]

Mr. Justice Powell expanded on this point in his concurring opinion in *Fullilove v. Klutznick*, 100 S. Ct. 2758 (1980):

> "Because the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred. In other words, two requirements must be met. First, the governmental body that attempts to impose a race-conscious remedy *must have the authority to act in response to identified discrimination*. Cf. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102, 96 S. Ct. 1895, 1905, 48 L. Ed. 2d 495 (1976). Second, the governmental body must make findings that demonstrate the existence of illegal discrimination. In *Bakke*, the Regents failed both requirements. *They were entrusted only with educational functions*, and they made no findings of past discrimination." 100 S. Ct. at 2785. [Emphasis supplied.]

There is no party in the present action which is competent to hold hearings and reach determinations regarding the desirability of a minority business enterprise set-aside program for the construction of state financed public schools.

Petitioners appear to place some reliance on this Court's recent decision in *Fullilove v. Klutznick*, 100 S. Ct. 2758 (1980).

The Court's plurality opinion in *Fullilove* approving the congressional enactment of a "minority business enterprise" set-aside provision in the Public Works Employment Act of 1977 emphasized that the program was a valid exercise of "the broad remedial powers of Congress". The Chief Justice's opinion stated:

> "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." 100 S. Ct. at 2777.

The San Francisco Board of Education does not possess broad remedial powers. It possesses only those powers conferred upon it by the State legislature. *Grigsby v. King*, 202 Cal. 299, 304 (1927). The adoption of social policies extrinsic to the School Board's mission of providing education facilities for the residents of San Francisco is simply not among the powers delegated to the Board by the State.

The linchpin of the *Fullilove* decision is the finding that Congress had adequate authority to address the issue of racial discrimination and prescribe reasonable remedies to redress the perceived discrimination. The Court's plurality opinion held that Section 5 of the Fourteenth Amendment granted Congress the power to regulate the procurement practices of state and local grantees of federal funds and that the objectives of the MBE program were within the power of Congress under Section 5 "to enforce by appropriate legislation" the equal protection guarantees of the Fourteenth Amendment. Nothing in *Fullilove* suggests, however, that the Court felt that lower level administrative agencies possessed such power.

Justice Powell's concurring opinion noted:

> "My view that this set-aside is within the discretion of Congress does not imply that other methods are unavailable to Congress. Nor do I conclude that use of a set-aside always will be an appropriate remedy *or that the selection of a set-aside by any other governmental body will be constitutional*". 100 S. Ct. at 2794 n. 14. [Emphasis supplied.]

Justice Powell concluded by noting:

> "[T]he issue here turns on the scope of *Congressional* power, and Congress has been given a unique constitutional role in the enforcement of the post-Civil War amendments. In this case, where Congress determined that minority contractors are victims of purposeful discrimination and where Congress chose a reasonably necessary means to effectuate its purpose I find no constitutional reason to invalidate [the minority set-aside program]." 100 S. Ct. at 2794. [Emphasis supplied; footnote omitted.]

By contrast, the San Francisco School Board is not the repository of broad legislative and administrative powers. Instead, it is a local agency whose educational mission is strictly prescribed by the provisions of the California Education Code.

The question this case poses, then, is not whether there is an obligation to engage in affirmative action to remedy past discrimination, but *who* possesses such an obligation.

C. This Case Does Not Present an Appropriate Occasion for the Court to Consider What Entities Other Than Congress May Be Obligated to Adopt Race-Conscious Remedies for Past Discrimination.

Petitioners' last argument is that certiorari should be granted in this case to permit the Court to determine what entities other than Congress may be permitted or required

to identify instances of past discrimination and adopt remedies to redress them.

Respondents cannot concur that this is an appropriate case for such a consideration, since it seems quite clear that whatever entities other than Congress may have the right or obligation to adopt such remedies, the San Francisco School Board is not one of them.

Petitioners argue that certiorari should be granted in this case because the Circuit Court of Appeals' opinion apparently conflicts with the position taken by the Sixth Circuit in *Detroit Police Officers Association v. Young*, 608 F. 2d 671 (6th Cir. 1979).

This argument misconceives the posture of this case. The Sixth Circuit's extensive opinion in *Young* does not deal with the issue of the authority of the Detroit Police Department to set standards for the recruitment and promotion of police personnel. No argument was made that the Detroit Police Department did not possess such authority; rather, the argument advanced in that case was that the recruitment and promotion program violated state and federal statutes and provisions of the U.S. Constitution, and was predicated upon inadequate factual findings of prior discrimination. In its opinion reversing a number of factual findings of the U.S. District Court, the Sixth Circuit stated that "the Constitution imposes on states a duty to take affirmative steps to eliminate the continuing effects of past discrimination." 608 F. 2d at 691. However, the Sixth Circuit did not purport to state *what* steps would be appropriate in a given case.

In a footnote in its opinion in the present case, the Ninth Circuit notes its disagreement with *Young* "*to the extent* that the Sixth Circuit has relied on "reshuffle" cases to find a duty of states to take "stacked deck" affirmative action . . ." 616 F. 2d at 1386 n. 9. [Emphasis supplied.]

It can readily be seen that the asserted "conflict" between the two opinions is more apparent than real. Given the absence of authority vested in the District and the Board to adopt the Affirmative Action Policy for construction contract bids, the issue of whether an appropriate remedy would be of the "reshuffle" or the "stacked deck" variety is beside the point. Thus, the Ninth Circuit's disagreement with the quoted passage in *Young* is dicta.

Petitioners' assertion that the holding in the present action raises the same issues as are present in *Minnick v. Department of Corrections*, 95 Cal. App. 3d 506 (1979), *cert. granted*, 48 U.S.L.W. 3851 (July 2, 1980) (No. 79-1213), is simply wrong. In *Minnick*, two male Caucasians brought suit against the California Department of Corrections and its Director, alleging that they had violated various statutory and constitutional strictures by carrying out an affirmative action program in the hiring and promotion of Department of Corrections personnel.

Unlike the present action, the *Minnick* opinion raises no issue regarding the authority of the Department of Corrections and its director to promulgate legal regulations governing the hiring and promotion of Department of Corrections employees.

If this was a case in which the San Francisco School Board adopted an affirmative action program to govern hiring and promotion of *its own* employees, then it might be said to raise questions parallel to those present in *Minnick*. But this is not such a case.

All the Court is faced with here is an effort by a local school board to adopt its own unique bidding requirements for state financed school construction projects which are built within its boundaries.

D. Petitioners' Dissatisfaction With the "Reshuffle" and "Stacked Deck" Analysis Adopted by the Ninth Circuit Court of Appeals Does Not Furnish a Proper Basis for the Grant of Certiorari.

Although it is not stated by the Petitioners as a separate ground for their request for a Writ of Certiorari, it is apparent that the Petitioners take strong issue with the distinction drawn by the Ninth Circuit Court of Appeals between "reshuffle" and "stacked deck" remedies for past discrimination. However, the Petitioners' disagreement with the Circuit Court's analysis of various types of remedies for discrimination does not justify the grant of certiorari in this case.

Whether or not the Ninth Circuit Court of Appeals is correct in its analysis of "reshuffle" and "stacked deck" remedies for past discrimination, it is clear that the School Board is not the party charged with addressing the problem in its bidding procedures. Thus, the Petitioners' quibbles with the Circuit Court's analysis should not distract this Court from the pregnant fact that the School Board's Affirmative Action Policy went far beyond the authority vested in the Board under the provisions of the California Education Code.

E. Certiorari Should Not Be Granted Because the Resolution of This Case Turns on an Interpretation of Provisions of State Law.

As Respondents have already noted at length, the critical issue in this case is the nature and extent of the powers possessed by the San Francisco School Board, which is a "creature of statute" controlled by the provisions of the California Education Code. The District Court's conclusion that the School Board lacked the authority to enact the Affirmative Action Policy was based upon an extensive analysis of two provisions of the California Education Code, the "lowest responsible bidder" statute (California Edu-

cation Code §39640) and the general enabling provision (California Education Code §35160). The construction and interpretation of these statutes is entirely a matter of California law, which presents no questions of significance for this Court. The broad constitutional questions which Petitioners seek to advance arise only if one ignores the immediate issue of the Board's lack of authority to concern itself with matters which have not been delegated to it.

IV.

Conclusion.

The Petition for Writ of Certiorari should be denied.

Dated: November 18, 1980.

Respectfully submitted,

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No. 80-295

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1980

National Association of Minority Contractors and Minority Contractors Association of Northern California, Inc.,

Petitioners

vs.

Associated General Contractors of California, et al.,

Respondents.

REPLY OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petition in this case raises three issues:

1. Is a state agency obliged to take appropriate action, including race conscious action, to remedy prior discrimination against racial minorities?

2. May a state, by statute, prohibit such race conscious remedies, even where premised upon findings of actual discrimination; and

3. May such race conscious remedies be authorized by a governmental agency other than Congress?

The response to the petition does not deny either the significance of those questions as a matter of constitutional jurisprudence, nor does it suggest that petitioners' view of those issues is

wrong. Rather, Respondents argue that such issues are somehow "not presented" by this case, a position they reach by characterizing this case as involving simply matters of state law statutory interpretation and the limits of delegated authority. With respect, that is an incorrect characterization not only of the issues presented by the petition, but the decision of the Ninth Circuit from which review is sought. However much respondents would like matters to be otherwise, this case raises important and difficult constitutional questions which, as the Ninth Circuit recognized, must be answered before the status of the low bid law can be determined. Respondents' efforts to defeat such review by mischaracterizing the facts and ignoring the opinion below do little service to

the evaluative process of this Court.

1. Respondents' principal argument is that the question of a constitutional duty to engage in affirmative action to remedy past discrimination never arises in this case because the San Francisco School Board was not authorized to take affirmative action by the California Legislature and, thus, is incompetent to do so. With all respect, that simply gets the matter backwards. If there is a constitutional duty to take remedial action to remedy identified discrimination, then the low bid law -- whether regarded as a failure to delegate that obligation or, as it is, an across-the-board prohibition of such remedial conduct -- directly and inexorably contravenes that constitutional duty. One cannot avoid addressing the existence vel non of that constitutional

duty (which is the issue framed by the petition) by suggesting that the only question is who must discharge it. In short, Respondents' argument simply misses the point.

2. Even if Respondents were somehow correct, that there is a relevant distinction between the acts of a local agency and those of a state Legislature, the fact remains that in this case we are presented with a situation in which the California Legislature has forbidden, by statute, the taking of affirmative action through Education Section 35160.[1/]

1/ Respondents' suggestion (e.g. Response, pp. 6-8) that enacting race-conscious remedies is beyond the jurisdiction of the San Francisco School District is, also, plainly wrong. The District is expressly

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

charged by law with the letting of school construction contracts including the setting of terms therefor. See statutes and cases cited at Petition, p. 17 (r. 9). That authority expressly includes matters touching race discrimination in such projects. See 42 Cal. Op. Att'y Gen. 167 (1963); cf. Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.W.2d 907 (1969) cert. den. 396 U.S. 1004 (1970). Thus, but for the "low bid law" by which the state purports to prohibit such race conscious action, there is no question but that, under California law, the District would have had the power to adopt the program here in question.

Respondents' attempt to avoid that fact by instead characterizing the situation as one involving merely a "failure to delegate" by the State Legislature is simply erroneous. For Section 35160, interpreted even as Respondents would have it, is clearly a prohibition by the State of all race conscious remedies and is expressly intended to prohibit entities like the San Francisco School District from employing affirmative action to remedy past discrimination. Were this a case in which jurisdiction to employ race conscious remedies in the awarding of school construction contracts had been reserved by the State to some other agency (state or local) there might be some pertinence to Respondents' position. However, given the facts as they are, this case squarely presents the issue (discussed

at pages 12-15 of the petition) whether, under this Court's prior decisions, such as North Carolina Board of Education v. Swann, 402 U.S. 43 (1971)[2/] it is unconstitutional

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2/ For the reasons given in text, Respondents' attempt to distinguish Swann is simply beside the point. Here, as in Swann, "the issue [is] whether a state could enact a statute which would actively hinder vindication of federal constitutional rights" (Response to Petition at 7; emphasis in original). The observation that, in this case, the low bid law is intended to protect the public fisc" is, with all respect, a non sequitur to the proposition for which it is purportedly offered, as well as irrelevant to the constitutional analysis in our petition.

for a state to attempt to prohibit race conscious remedies for prior discrimination.

3. Respondent's reply to the suggestion that this petition should be granted to consider whether entities other than Congress have authority to adopt race conscious remedies for past discrimination is also beside the point. Their Response goes on at length (see pages 9-12) suggesting that the question of the "identity" of the agency taking such action is critical to its validity. Yet that is precisely our point and the very issue upon which certiorari should be granted. That issue was expressly left open by Justice Powell in Fullilove v. Klutznick, _____ U.S. _____ (1980). See Petition at 20-21 and n. 14. Moreover, whether this question is raised in this case

as well as in Minnick and Young, or only here, the importance of the issue remains as does the fact that it was left open in Fullilove and should be addressed by this Court.[3/]

Dated: November 20, 1980

Respectfully,

STEPHEN V. BOMSE
Attorney for
Petitioners

3/ Respondents' suggestion, at pages 15-16 of the Response, that this case only involves questions of interpreting state law is simply unfathomable. While it is true that the constitutional issues raised by the petition and decided by the Ninth Circuit arise because of the interpretation placed on the low bid law in the courts below, that fact in no way avoids the presence of those issues, nor does it diminish their importance.